(7)

No. 03-7434

Supreme Court, U.S.
FILED
FEB 25 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DANIEL BENITEZ,

Petitioner,

v.

JOHN MATA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX

JOHN S. MILLS
MILLS & CARLIN, P.A.
865 May Street
Jacksonville, Florida
32204
(904) 350-0075
Counsel of Petitioner

THEODORE B. OLSON,
Solicitor General
United States
Department of Justice
950 Pennsylvania Avenue, N.W.,
Room 5614
Washington, D.C. 20530-0001
(202) 514-2217
Counsel for Respondent

Petition For Certiorari Filed October 14, 2003
Certiorari Granted January 16, 2004

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OR CALL COLLECT (402) 342-2831

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CHRONOLOGICAL LIST OF
RELEVANT DOCKET ENTRIES

1/11/02	PETITION for writ of habeas corpus; Federal habeas under 28:2241. Filing Fee: $5.00 Receipt#: 106506 [Entry date 01/14/02]
1/11/02	CASE REFEREED to Magistrate Judge Miles Davis [Entry date 01/14/02]
1/16/02	ORDER BY Magistrate Judge Miles Davis, Clerk to send copies of the petition to the resp., US Atty for this District and the US Atty General. Resp shal [sic] have 60 days in which to file and answer. Pet has 30 days to file a reply. Setting answer deadline for 3/17/02 for ROBERT WALLIS, Setting response to order deadline Re: to file reply to answer for 4/16/02 for DANIEL BENITEZ Copies sent as noted on document
3/18/02	ANSWER to Petition by respondent ROBERT WALLIS (ATTORNEY: MICHAEL P FINNER) [Entry date 03/1902]
4/4/02	RESPONSE by petitioner DANIEL BENITEZ re: answer by ROBER [sic] WALLIS. [Entry date 04/04/02]
4/8/02	REPORT AND RECOMMENDATION by Magistrate Judge Miles Davis that petition for writ of habeas corpus should be DENIED Objections to R and R due by 4/29/02 Motion(s) no longer referred: Copies sent noted on document.
4/26/02	OBJECTION by petitioner DANIEL BENITEZ to report and recommendations
5/6/02	MOTION by petition DANIEL BENITEZ in support of objection nto [sic] petitioner's denial [Entry date 05/07/02]

7/11/02 ORDER by Judge Maurice M Paul adopting report and recommendations of Magistrate Judge Miles Davis and denying petition for writ of habeas corpus Copies sent as noted on document. [Entry date 07/12/03]

7/17/03 JUDGMENT for respondent ROBERT WALLIS against petition DANIEL BENITEZ pursuant to Court's order denying petition for writ of habeas corpus Copes [sic] sent as noted on document. Case closed

7/26/02 NOTICE of appeal by petitioner DANIEL BENITEZ of order Certificate of Readiness due 8/12/02 (received in Gainesville 8/2/02) [Entry date 08/05/02]

3/12/03 Appointment of and Authority to Pay Appointed Counsel Under Addendum Five (by Court of Appeals)

5/12/03 Respondent's Status Report Served (in Court of Appeals)

5/20/03 Petitioner's Motion to Strike Statement and attachment in Respondent's Status Report Served (in Court of Appeals)

5/22/03 Respondent's Response to Petitioner's Motion to Strike Statement and Attachment in Respondent's Status Report Served (in Court of Appeals)

5/29/03 Order Denying Petitioner's Motion to Strike Statement and Attachment in Respondent's status Report Served Entered (by Court of Appeals)

7/17/03 Opinion Filed (by Court of Appeals)

7/17/03 Judgment of Court of Appeals Filed

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA FLORIDA

Daniel Banitez

Petitioner 5:02CV19/MMP/MD

VS.

ROBERT WALLIS, DIRECTOR
UNITED STATES IMMIGRATION AND
NATURALIZATION SERVICE

_____/

Writ of Habeas Corpus challenging the violation of Substantive Due Process Vis-à-vis Illegal Confinement

Petitioner detained on the behalf of INS

(Filed Jan. 11, 2002)

Bay County Jail Annex
5600 Nehi Road
Panama City, Florida

FORM TO BE USED BY FEDERAL PRISONERS FILING A PETITION FOR WRIT OF HABEAS CORPUS PURSUANT TO 28 U.S.C. § 2241

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
Panama, City DIVISION

Daniel Benitez 01-11721K
5600 Nehi Road
Panama City, Florida 32404
(Name, prison number, and address of place of confinement of Petitioner),

Case Number:

Petitioner, (To be assigned by Clerk)

vs.

Robert A. Willis
I.N.S. director

(Name of warden or other official having custody of Petitioner),

Respondent.

HABEAS APPLICANTS MUST COMPLETE THIS ENTIRE FORM

PLEASE COMPLETE THE FOLLOWING (check where applicable):

1. This petition concerns:

(a) ____ a conviction

(b) ____ a sentence

(c) ____ jail or prison conditions

(d) ____ prison discipline

(e) ____ parole

(f) ✓ other (explain) Illegal indefinite detention.

2. Provide the following information regarding the conviction(s) and sentence(s) for which you are presently incarcerated:

(a) Name(s) and location(s) of court: The Circuit Court of the Eleventh Judicial Circuit of Florida in and for Miami Dade County Criminal Division Miami, Florida 1351 NW 12th Street 33125

(b) Case number(s): F-91-40952

(c) Nature of the charge(s) for which you were convicted: Armed Robbery, Armed Burglary

(d) The conviction followed your plea of ✓ guilty, ___ not guilty, or ___ nolo contendere.

(e) Did you appeal the conviction or sentence? ____ Yes, ✓ No. If yes, state the date, outcome, and number assigned to the appeal:

_____

3. Are you currently represented by counsel in this case or any other court case? ___ Yes, ___ No.

4. In the spaces below, set forth every ground which supports your claim that you are incarcerated unlawfully. Briefly summarize the specific facts in support of each ground raised, and provide the information regarding exhaustion under your summary of facts. You may attach additional pages, if necessary. Conclusions which are not supported by specific facts are insufficient. Do not cite any law in your statement of facts.

CAUTION: An application for writ of habeas corpus by a prisoner authorized to apply for relief by motion under 28 U.S.C. § 2255 will not be entertained by the Court unless it appears that the remedy by § 2255 motion is inadequate. Therefore, IF any of the grounds raised below challenge the validity of your conviction or sentence as imposed by the sentencing court, YOU MUST COMPLETE ITEM 5. If they do not, you may skip item 5.

(a) GROUND ONE: N/A

SUPPORTING FACTS: I was sentenced on 4-5-1993 to 20 years state prison. I finished my sentence on 7-27-2001, and I was re-arrested by I.N.S. oficials [sic] on the same day.

I have been detained under indefinite detention since 7-27-2001. I'm a Cuban citizen but my country has not repatriation agreement with the United States.

I came to this country on June 1980. Petitioner has been unlawfully detained by I.N.S. for more than five (5) months. There exist no other remedy available for lawful release except this petition for habeas corpus.

EXHAUSTION: Have you presented ground one to the Bureau of Prisons, or in any other administrative or judicial proceeding? ____ Yes, ✓ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals: N/A

(b) GROUND TWO: N/A

SUPPORTING FACTS: N/A

EXHAUSTION: Have you presented ground two to the Bureau of Prisons, or in any other administrative or judicial proceeding? ___ Yes, ___ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals: N/A

(c) GROUND THREE: N/A

SUPPORTING FACTS: N/A

EXHAUSTION: Have you presented ground three to the Bureau of Prisons, or in any other administrative or judicial proceeding? ___ Yes, ___ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals:

(d) GROUND FOUR: N/A

SUPPORTING FACTS: N/A

EXHAUSTION: Have you presented ground four to the Bureau of Prisons, or in any other administrative or judicial

proceeding? ___ Yes, ___ No. If yes, provide the number(s) assigned to the proceeding, the result(s), and the date(s) of the result(s) of that proceeding, including any appeals: N/A

5. If any of the grounds raised above challenge your conviction or sentence imposed by the sentencing court:

(a) Explain in the space below why your remedy under 28 U.S.C. § 2255 is inadequate or ineffective to test the legality of your detention: N/A

(b) State whether you have ever filed a § 2255 motion, and the result: N/A

6. WHEREFORE, based on the grounds raised above, Petitioner prays that the court will grant the following relief: Stop the ilegal [sic] indefinite detention. Immediate release.

DECLARATION

I declare under penalty of perjury that I have read the above and state that the information contained therein is true and correct to the best of my knowledge.

Executed 1-1-2002, at Bay County Jail/Annex,
(date) (place)

by /s/ Daniel Benitez
Petitioner

N/A
Signature of Attorney (if applicable)

Note: If you have not paid the $5.00 filing fee, you must also submit an application to proceed in forma pauperis, which must also be signed under penalty of perjury.

SUPPORTIVE LEGAL ARGUMENT OPPOSING INDEFINITE DETENTION

On June 28, 2001, the United States Supreme Court issued it's ruling on the issue of indefinite detention in the matter of ***ZADVYDAS v. DAVIS*, Nos. 99-7791, 00-38, 2001 WL 720662 (June 28, 2001).** Before the Court for consideration was whether the Immigration and Naturalization Service (hereinafter "INS") has the authority to detain indefinitely an alien, unable to be removed or deported, beyond the 90-day statutory period provided under INA sect. 241(a)(1), and if so, for how long and under what circumstances.

Using the unambiguous demands of United States Constitution as it's foundation, the Court held that the current detention provisions **do not** permit the government to detain an alien indefinitely merely because no country is willing to accept him or her.

The Court went further to conclude that under the post-removal period detention provisions, the INS was implicitly limited as to what could be construed as "the period reasonably necessary to bring about [the alien at issue's] removal."

In October 2000, the Supreme Court granted certiorari in ***MA v. RENO*, 121 S. Ct. 297 (2000)** and ***ZADVYDAS v. UNDERDOWN*, 121 S. Ct. 297 (2000),** and consolidated the two cases for argument. The opinions of the Court in the two aforementioned cases were then used by the Court to aid in formulating it's decision in ***ZADVYDAS v. DAVIS*, Nos. 99-7791, 00-38, 2001 WL 720662 (June 28, 2001).**

The Ninth Circuit's analysis in ***MA***, began with the question as to whether Congress had given the INS the authority to detain the petitioner (an alien) indefinitely. As explained by the Court, generally, once an alien has been found removable, the Attorney General **must** remove him or her within 90 days after the removal order becomes final. There are however, many other aliens that for a colorful variety of reasons cannot be removed within those 90 days. The Court submitted for example those aliens which have been ordered removed to a country lacking a repatriation agreement with the United States, aliens under removal order to a country that simply refuses to accept him or her for other reasons, or as in some cases, removal just cannot be attained within the 90 day period.

Kim Ho Ma, an alien from Cambodia, had been convicted of Manslaughter in a gang-related shooting and sentenced to a term of imprisonment at the early age of 17. Ma was taken into custody by the INS and ordered removed upon termination of incarceration. Though under removal order, Ma remained detained with no definite end in sight. Ma challenged the constitutionality of his indefinite detention.

Ultimately, the Ninth Circuit Court heard arguments in the matter of indefinite detention on appeal from the U.S. District Court of the Western District of Washington, ***KIM HO MA v. RENO*, 56 F. Supp. 1165 (W.D. Wash. 1999.** The Court determined that Ma's continued detention violated his substantive due process rights under the Fifth Amendment to the United States Constitution and ordered him immediately released from detention. The Court made special note that, though under final removal order, the INS had been unable to remove Ma because his native land of Cambodia would not permit his return, and

the United States did not have a repatriation agreement with Cambodia. In short, removal was not in the reasonably foreseeable future barring continued detention.

In conclusion, the Ninth Circuit held that the INS lacked the authority to detain, for longer than **"a reasonable time beyond the normal ninety day statutory period authorized for removal"** an alien who had entered the United States.

In the opinion drafted under the hand of the Honorable Judge Stephen Reinhardt, the Court held that in cases where **"there is no reasonable likelihood that the alien will be removed in the reasonably foreseeable future,"** the INS **"may not detain the alien beyond that statutory period."** ***MA v. RENO*, 208 F.3d 815 (9th Cir. 2000). [emphasis added].**

Under the applicable statute, aliens under a removal order who cannot be removed by the end of the 90-day statutory period, are separated into two (2) groups. Those aliens designated by statute to be in the first group are **required** under INA s. 241(a)(3) to be released subject to specific supervisory regulations. Those falling into the second group **may** be detained beyond the removal period under the statutory provisions of INA s. 241(a)(6). Should those aliens cataloged in the second group be released, they would then be required to comply with those same supervisory regulations established in INA s.241(a)(3).

In distinguishing between the two (2) groups, the Court explained that, among other things, an alien's conviction for a criminal offense (i.e. drug offenses, certain crimes of moral turpitude, aggravated felonies, firearm offenses, etc.) would place him or her into the second group.

Though detention beyond the 90-day statutory period is permissible under INA s. 241(a)(6), there are no specific limitations established therein as to exactly how long beyond the 90-day period detention is authorized. In ***MA*, supra,** the Ninth Circuit stated that any interpretation of the statute "must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be indefinitely, for a reasonable time, or some other temporal measure."

The INS' posture for argument was that the language of the statute incorporating the words "beyond the removal period" provided necessary authority to the INS to detain indefinitely an alien designated in the second group who cannot be removed in the reasonably foreseeable future. However, the Ninth Circuit rejected the INS' reading and interpretation of the relevant statute holding that the INS had the authority **only** to detain aliens for a reasonable time beyond the statutory removal period and **does not** permit indefinite detention of those aliens whose return **"there is no reasonable likelihood a foreign government will accept"** in the **"reasonably foreseeable future."** Instead, such aliens, the Court said, **must** be released subject to the supervisory authority outlined in the statute. ***MA v. RENO*, 208 F.3d 815 (9th Cir. 2000).**

As pointed out by the Court:

"... to sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies. In the simplest terms, to say that INS may hold persons beyond a particular date does not answer the question 'for how long?' The proper reading, we conclude, is that Congress intended only that the short statutory

period during which detention is ordinarily authorized not serve as an absolute barrier to a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose – the removal of the alien. Where no removal in the reasonably foreseeable future is possible, however, the statutory language, properly construed, does not authorize indefinite detention of such aliens."

The Court then noted the following:

" . . . when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention." The Court further noted that in holding as it had kept it's reading consonant with international law.

The INS contended the answer to the constitutional challenge of indefinite detention was governed by ***BARRERA-ECHAVARRIA v. RISON*, 44 F.3d 1441 (9th Cir. 1995)(en banc),** and ***SHAUGHNESSY v. UNITED STATES ex rel. MEZEI*, 345 U.S. 206 (1953).**

The Court rejected such contention because both the aforementioned cases involved what were termed as **"excludable aliens"** rather than aliens who had already actually entered the United States. Therefore, the constitutional analysis in both cases was explicitly formulated on the **"entry fiction"** which in and of itself allows courts to treat an alien subject to exclusion proceedings as an alien **"standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States."** Under such circumstances, it

would seem reasonable that indefinite detention could be upheld as constitutional. The Court did stress however, that it has long been established that an alien who has entered United States territory, **legally or illegally,** has constitutional rights, including Fifth Amendment rights. **[emphasis added].**

Efforts by the INS to extend the law pertaining to "excludable aliens" to other aliens who have entered the United States, but whom have been later ordered removed for a number of reasons, the Ninth Circuit noted, would raise serious substantial constitutional questions. To adopt such logic would require the reconciliation of principals long established in ***WONG WING*** **"which affords constitutional protection to aliens who have been ordered deported, with the INS' suggested rule – which would (by extending the constitutional jurisprudence governing excludable aliens to such aliens) strip them of such protection."** The Court noted further that such would be **"a daunting, if not impossible, task."**

To construe INA s. 241(a)(6) by utilizing and asserting a reasonable interpretation that avoids such a constitutional inquiry is the appropriate avenue and course. ***WONG WING v. UNITED STATES*, 163 U.S. 228 (1896).**

The Petitioner concedes that the holdings of the Courts in the above-mentioned cases and their attached analysis does by no means leave the INS or government without adequate remedies with respect to aliens who may not be permanently or indefinitely detained. All aliens, regardless of the nature of circumstances, who are ordered released from detention must comply with the stringent supervision requirements of INA s. 241(a)(3). Any failure

to comply with those regulations, both through engaging in criminal activity or otherwise, could result in a revocation of their release status and once again return then to detention, most probably for an indefinite period.

In ***ZADVYDAS v. UNDERDOWN,*** the Fifth Circuit reached a different conclusion resulting in the reversal of the District Court's granting of a Writ of Habeas Corpus and order releasing the detained alien. The Fifth Circuit held that the INS has the authority to detain a resident alien based on either his or her possible danger to the community or flight risk, so long as legitimate **"good faith efforts to effectuate the alien's deportation continue and reasonable parole and periodic review procedures are in place." [emphasis added]**

Having concluded their analysis of the two (2) aforementioned cases, the Supreme Court began its' dissection of ***ZADVYDAS v. DAVIS,*** **Nos. 99-7791, 00-38, 2001 WL 720662 (June 28, 2001).** Before the Court for issue was whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States.

The Honorable Justice Breyer, in writing for the majority, began the Court's consideration by identifying the aliens to whom INA s. 241(a)(6) actually applies. The Court found the statute to apply to:

" . . . inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal."

Though the Government argued that said statute should be construed as authorizing the Attorney General, not the Courts, to determine whether or not an alien should continue to be detained, and if so, for exactly how long. To allow such a reading would shatter the long-standing, well-settled "cardinal principle" of statutory interpretation that when a statute "raises a serious doubt" regarding constitutionality, the Court will initially determine whether there is a construction that provides an avenue for the question to be avoided. ***CROMWELL v. BENSON,*** **285 U.S. 22, 62 (1932).**

Applying such creation of statutory construction, Justice Breyer stated that based on the Due Process Clause of the United States Constitution, a **"statute permitting indefinite detention of an alien would raise a serious constitutional problem"** because **"[f]reedom from imprisonment – from government custody, detention, or other forms of physical restraint – lies at the heart of the liberty that Clause protects."**

Further, the Court stated that government detention contravenes due process, unless the detention were ordered in a criminal issue or proceeding with attached adequate procedural protections. See, ***UNITED STATES v. SALERNO,*** **481 U.S. 739 (1987).** Recognizing that the detention in this matter is civil in nature, as opposed to criminal, the Court opined that there were no **"sufficiently strong special justification here for indefinite civil detention – at least as administered under this statute."** The government identified two (2) regulatory goals for the statute, the Court noted: (1) ensuring that aliens appear at future immigration proceedings, and (2) guarding against danger to the community. Applying

such goals, the majority found that "the first justification – preventing flight – is weak or nonexistent where removal seems a remote possibility."

In addressing the second goal, the majority held that while the need to protect the community certainly would not diminish in force over any period of time, the Court has permitted detention as a preventative measure exclusively in matters regarding **"specially dangerous individulas"** and **only** then supported by **"strong procedural measures."** In addition, in those cases where preventative detention has been allowed and said detention is potentially indefinite, the Court then required that the "dangerousness rationale" be supported by some sort of special circumstance, such as mental illness, that enhances the creation of danger.

The government then argued, as in ***MEZEI***, *inter alia,* that simple alien status, on it's own, could justify indefinite detention. However, the Court was not persuaded with such argument in any manner. The Court distinguished between two separate groups of aliens, (1) an alien who had at one time lawfully entered the United States, left for an extended period of time, then was denied admittance upon return; and (2) an alien who had actually "entered" the United States, as the petitioners have in the case at bar.

When considering whether an alien has actually "entered" the United States, it is an important determination to make in that at the time of entry certain constitutional protections then become available to those "persons" inside the United States.

In relying heavily on ***PLYLER*** the majority held that the Due Process Clause, applicable to **all** "persons" within the United States, including aliens, whether their presence in the United States be lawful, unlawful, temporary,

or even permanent, would attach the moment said alien enters the United States. See, ***PLYLER v. DOE*, 457 U.S. 202 (1982).**

The Court further acknowledged that under the holding in ***LANDON***, while the elements of "status and circumstances" may modify the actual nature of due process safeguards for an alien subject to final removal order, courts have long held that the Due Process Clause does protect. ***LANDON v. PLASENCIA*, 459 U.S. 21 (1982) citing, *WONG WING v. UNITED STATES*, 163 U.S. 228, 16 S. Ct. 977 (1896).**

In bringing it's analysis of all issues to a conclusion, the Supreme Court asserted it's belief that **"an alien's liberty interest is, at the least, strong enough to raise a serious question as to whether, irrespective of the procedures used, the Constitution permits detention that is indefinite and potentially permanent."**

Despite possible constitutional problems, the Court recognized that should it have been the intention of Congress to be clear in it's statute authorizing indefinite detention, then courts must give effect to such intent. However, in consideration of such statutory intent by the Court, it was clear that Congress had not intended to authorize the Attorney General to hold indefinitely an alien who has been ordered removed.

While INA s.241(a)(6) is inclusive of the word "may", which would seem to indicate an allowance of discretion, it **does not** indicate authority for unlimited discretion. Given that each individual word of a statute must be strictly construed, one must conclude that had Congress truly intended to permit any long-term detention of

unremovable aliens, it would certainly have incorporated the specific language permitting such to appear in the statute. However, this was not done during the initial enactment of the statute, nor has it been done under any recent amendments to same.

In ***ZADVYDAS***, the Court rejected the Governments' assertion that discretionary release is simply the exception to the rule of mandatory detention. The Court stated that the detention provisions before it in consideration for scrutiny apply to all aliens from ordinary visa violator, terrorists, as well as other criminals, and the post-removal-period detention, as opposed to detention pending determination of removability or the subsequent 90-day removal period, has no obvious termination point.

Also unmoving to the majority was the Government's contention that application to cases throughout the history of the detention statute supported indefinite detention. In fact, Justice Breyer countered such assertions by concluding he finds that **"nothing in the history of these statutes clearly demonstrates a congressional intent to authorize indefinite, perhaps permanent detention." [emphasis added].**

Based on this foundation, in strictly construing the applicable statutes, in a manner avoiding possible constitutional problems, the Court concluded that at the point where removal is not "reasonably foreseeable" the statute **no longer permits continued detention. [emphasis added].**

As to what would constitute detention beyond those limits established by statute or otherwise a period "reasonably necessary to secure removal," the Court held that a habeas court should find continued detention unreasonable,

and therefore not permitted, if removal is not "reasonably foreseeable." Quite obviously, if an alien under final removal order cannot be returned to his native land or even a third country because they refuse to accept him or her, or any other variety of colorful reasons, their removal is not "reasonably foreseeable."

In those cases where detention lay outside statutory boundaries, the majority held, the alien should then be released into the community, subject to the strict terms and conditions of supervised release. However, in those case [sic] where removal is "reasonably foreseeable" then the majority charged the reviewing court with the responsibility to "consider the risk of the alien's committing further crimes as a factor potentially justifying confinement within that reasonable removal period."

As to what is considered a presumptively reasonable period of detention/time, Justice Breyer provided the following guidelines in writing for the majority, stating, in part:

" . . . while an argument can be made for confining any presumption to 90 days, we doubt that when Congress shortened the removal period to 90 days in 1996 it believed that all reasonably foreseeable removals could be accomplished in that time. We do have reason to believe, however, that Congress previously doubted the constitutionality of detention for more than six months . . . Consequently, for the sake of uniform administration in the federal courts, we recognize that period. After this 6-month period, once the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the

Government 'must' respond with evidence sufficient to rebut that showing. And for detention to remain reasonable, as the period of prior post-removal confinement grows, what counts as the 'reasonably foreseeable future' conversely would have to shrink."

In it's final conclusion, the majority held that permanent detention continuing as long as good-faith efforts were being made to effectuate the aliens removal would require an alien seeking release to bare the burden of showing the absence of any prospect for removal, no matter how unlikely or unforeseeable. To enforce such an applicable reading into a statute, the majority stated, would be to insist upon **"more than our reading of the statute can bear."**

On July 19, 2001, the Attorney General submitted *his opinion* regarding interpretation of the Supreme Court's ruling in ***ZADVYDAS*** to the INS as a guide or instruction on how to apply it's holding to those aliens seeking release. In said opinion, the Attorney General seems to read into the majority opinion language, words or a conclusion that simply does not appear.

The Attorney General opines that the Supreme Court made it clear in ***ZADVYDAS v. DAVIS*** THAT IT'S HOLDING **"doe s not apply to those aliens who are still legally at our borders or who have been paroled into the country (such as the Mariel Cubans)."** Such a reading of the majority opinion is erroneous in that it never specifically identifies "Mariel Cubans" or separates any ethnic groups of people for the purposes of singular application.

What is addressed, *inter alia*, is the difference between what would be catalogued as an "excludable alien" versus a "deportable alien", or those aliens whom have already entered the United States, and the effect of applicable detention statutes on all aliens in general. Though respectful to his position and authority, the Attorney General attempts to read into the majority opinion of our United States Supreme Court a meaning and/or conclusion that simply is nonexistent.

Petitioner concedes that the Attorney General has the authority to render decisions regarding the actual detention of an alien. Hence, petitioner does not combat or challenge the issues of that specific authority. However, he [Attorney General] is not afforded the luxury of taking the holdings or interpretations of this country's most honored and highest court and molding or manipulating them in a manner consistent to his personal beliefs or likings in order to apply them however he sees fit, to whomever he pleases, and not specifically as the Supreme Court intends. Such actions would be an abuse of authority in his official capacity and clear the way to additional constitutional problems.

If our Supreme Court had specifically addressed "Mariel Cubans" in a manner as to catalogue them with "excludable aliens," such an issue was addressed well over 100 years ago when the Supreme Court held that "excludable aliens" have some due process rights. The Court clearly stated in the later case of ***ADDINGTON,*** that "civil commitment *for any purpose* constitutes a significant deprivation of liberty that requires due process protection. ***ADDINGTON v. TEXAS*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed. 2D 323 (1979).**

In ***BARRERA-ECHAVARRIA***, the Supreme Court upheld as Constitutional the long-term detention of aliens who had not yet entered the U.S. The court based its decision on the 'entry fiction' recognizing those special aliens as individuals standing on the threshold of entry and therefore **not** entitled to the constitutional protection provided to those within the territorial jurisdiction of the United States. Conversely, the court gave credence to the establishment that an alien who has in fact actually entered the United States legally or illegally, has constitutional rights, including, but not limited to, those set forth in the Fifth Amendment. See, ***BARRERA-ECHAVARRIA v. RISON*, 44 F.3d 1441 (9th Cir. 1995) (en banc);** also, ***SHAUGHNESSY v. UNITED STATES ex rel. MEZEI*, 345 U.S. 206 (1953).**

A closer analysis would conclude that even Mariel Cubans would not be included in those classes of aliens identified in ***BARRERA-ECHAVARRIA***. In fact, important to note that during the occurrences of the Mariel Boatlift of 1980, normal restrictions and requirements for entry into the U.S. were lifted, or so set aside, under Executive Order by former President of the United States Jimmy Carter. The Attorney General lacks the authority to set aside an executive order issued by the President. Even if the authority existed and a law newly enacted yet effectively applying to Mariel Cubans retroactively, would certainly violate the ex post facto provisions of the United States Constitution. Hence, Mariel Cubans cannot be classified as aliens who have been "stopped at the border" or "paroled into the country" merely for the convenience of arbitrarily applying a statute, erroneously at that, to justify detention that technically has no end.

To establish such contention, an individual designated as a 'Mariel Cuban' would have to assume the distinction of a 'parolee'. Hence, he or she could then be viewed as having been released from a term of incarceration, previously imposed for a prior criminal conviction, into a term of community-based supervised release. More simply stated, a person cannot be a 'parolee' if he/she is not on 'parole'.

Black's defines "parole" as " . . . the release of a prisoner from imprisonment before the full sentence has been served . . . parole is usually granted for good behavior on the condition that the parolee regularly report to a supervising officer for a specified period."

Further, "parolee" is defined as " . . . a prisoner who is released on parole."

Black's Law Dictionary 7th Edition (1999)

"The essence of parole is release from prison, before completion of the sentence, on condition that the prisoner abide by certain rules during the balance of the sentence. Parole is not freedom."

59 Am. Jur. 2d Pardon and Parole sec. 6 (1987).

In light of such, Mariel Cubans cannot be construed as having been 'paroled into the country' merely for the convenience of allowing indefinite detention under the class of excludable aliens distinguished from by the Supreme Court in ***ZADVYDAS or BARRERA ECHAVARRIA.***

Accordingly, even Mariel Cubans are entitled to consideration for release from indefinite detention in a manner equal to any other "alien" or "non-citizen" in

accordance with provisions of the detention statutes and the holding of the Court in ***ZADVYDAS.***

In the instant case, the Petitioner was in fact establishing roots in the United States, equal in context to those of a naturalized American citizen, prior to his arrest. There was the establishment of a family, acquired employment, efforts to enhance their education, and other tangible and intangible aspects indicative to that of ties to the community. In instances where it was applicable, such as the Petitioner's, taxes were paid into federal regulatory agencies for social security or income taxes, just as any other citizen is required to do. Due to rather unfortunate circumstances, the Petitioner endured a plight with the criminal justice system that has been, and will continue to be humiliating and embarrassing. Nonetheless, the debt for such has been properly paid through incarceration. Since such conviction, the Petitioner has exhibit behavior that would indicate remorse and a desire to be successful, respected, trusted, and admired in society.

To now deny the Petitioner or any alien, other than those specifically identified as being dangerous under the guidelines discussed herein and established by majority opinion, the privilege and opportunity to slowly re-integrate back into society through supervised release, would discriminate against him or her and further be a violation of their constitutional rights to due process of law and equal protection of the law guaranteed them under the 5th and 14th Amendments to the United States Constitution.

Absent a showing by the INS that the Petitioner falls into those groups of aliens who can be removed in the reasonably foreseeable future, or otherwise showing that

they are a flight of risk or pose a serious danger to the community if released, the Petitioner should be released from his state of indefinite detention and afforded the opportunity to once again become a functioning member of the citizenship of this great country.

Therefore, the Petitioner prays this Honorable Court issue the great Writ and order their immediate discharge from the current indefinite and otherwise permanent detention.

CERTIFICATE OF SERVICE

UNDER PENALTY OF PERJURY, I HEREBY CERTIFY, that three true and correct copy and the original of the foregoing has been furnished and filed by me, to this federal district court including a motion to proceed in forma pauperis in compliance to the "Federal Mailbox Rule" (Rule 4A, Fed.R.Civ.P.), via submission to Institutional Authorities for mailing to this Court on this 1 day of Jan, ~~2001~~. 2002

/s/ Daniel Benitez
Print Name Daniel Benitez
Address 5600 Netti Road
Panama City, Florida 32404

UN-NOTARIZED OATH

UNDER PENALTY OF PERJURY, I Daniel Benitez, Pursuant to the provisions of 17 U.S.C. ss 2241, do hereby declare that I have read the foregoing, and that having intimate personal knowledge of them facts contained therein, swear that they are true and correct.

/s/ Daniel Benitez

Fri Jan 11 16:26:11 2002

UNITED STATES DISTRICT COURT

TALLAHASSEE, FL

Receipt No.	301	106506
Cashier		Susan
Tender Type		CHECK
Check Number:		3593
Transaction Type		N
DO Code	Div No	Acct
4617	3	086900
Amount		$5.00

HABEAS FILING FEE FOR DANIEL BENITEZ 5:0 2CV19/MMP/MD

EMILIO DE LA CAL 780 NE LEJEUNE RD STE 5 25 MIAMI, FL 33126

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner,

vs.

ROBERT A. WALLIS, in his official capacity as District Director, Immigration and Naturalization Service, **5:02cv19/MMP/MD**

Respondent.

ANSWER

(Filed Mar. 18, 2002)

John Ashcroft, in his official capacity as Attorney General of the United States, and as head of the United States Department of Justice, and its subdivision, the United States Immigration and Naturalization Service ("INS"), answers the petition of DANIEL BENITEZ for habeas corpus relief and states:

Factual Background

DANIEL BENITEZ is a native and citizen of Cuba who attempted entry into the United States at Key West, Florida, on or about June 26, 1980, from the port of Mariel, Cuba. *See* Exhibit A, Form I-94, Arrival/Departure Record. He was paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA") on July 3, 1980. *Id.*

On June 20, 1983, petitioner was convicted in Dade County, Florida, of grand theft, for which he received a three-year term of probation. *See* Composite Exhibit B: *State of Florida v. Benitez,* Case No. 83-2110. On April 30, 1985, an application submitted by petitioner to adjust his status to that of lawful permanent resident was denied on the basis of his criminal conviction. *See* Exhibit C, Denial of Adjustment of Status Application. A second application for adjustment of status was denied on March 9, 1990, for lack of prosecution. *See* Exhibit D, Second Denial of Adjustment.

On April 5, 1993, petitioner pled guilty to a multi-count indictment. *See* Exhibit E: *State of Florida v. Benitez*, Case No. 91-40952-A. He was convicted of the following offenses: Armed Burglary of a Structure, Armed Burglary of a Conveyance, Armed Robbery, Unlawful Possession of a Firearm While Engaged in a Criminal Offense, Carrying a Concealed Firearm, Aggravated Battery and Unlawful Possession, Sale or Delivery of a Firearm with Altered or Removed Serial Number, and was sentenced to a term of 20 years imprisonment. *Id.*

Based on his criminal convictions, petitioner's parole was revoked on June 1, 1993. *See* Exhibit F, Revocation of Parole. Thereafter, petitioner was charged as being excludable pursuant to § 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(A)(7)(a)(i)(I), as an intending immigrant not in possession of valid travel documents; and § 212(a)(2)(B), 8 U.S.C. § 1182(a)(2)(B), as an alien who has been convicted of multiple criminal convictions for which the aggregate term of confinement exceeds five years. *See* Exhibit G, Form I-122. At a hearing before Charles J. Sanders, Immigration Judge, on December 12, 1994, petitioner was found excludable and deportable to Cuba. *See* Exhibit H, Immigration Judge's

Decision. The petitioner waived his appeal of this decision. *Id.*

On October 11, 2001, upon completion of his state prison sentence and transfer into INS custody, petitioner received notice that his status would be reviewed pursuant to the Cuban Review Plan to determine whether it is in the public interest to release him from INS custody. *See* Exhibit I, Notice of Need to Undergo Cuban Review Plan Process.

On January 11, 2002, petitioner filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 (doc. 1). The petition does not contest the underlying immigration order of excludability, but merely challenges petitioner's continued custody by INS. *Id.* On January 17, 2002, petitioner received a Notice of Releasability by the Cuban Review Plan, in which a panel determined that the petitioner was releasable under the criteria established by the Plan at such time as the INS determines that a suitable sponsorship to a half-way house may be arranged. *See* Exhibit J, Notice of Releasability.

DISCUSSION

Habeas Jurisdiction

This court has jurisdiction to consider a challenge to the petitioner's continued detention in habeas corpus proceedings. *See Zadvydas v. Davis*, 533 U.S. ___, 121 S.Ct. 2491, 2497 (2001) (discussing that the 1996 amendments to the Immigration and Nationality Act ("INA") did not repeal habeas jurisdiction over INS detention issues). However, the INS' decision not to parole the petitioner is lawful, and is not governed by the *Zadvydas'* six-month presumptively reasonable detention standard. This is because of petitioner's status as an alien inadmissible to the United States. *Id.* at 2500.

Petitioner's Status as an Excludable Alien

As noted above, petitioner was apprehended by INS before he effected entry into the United States, and his prior release from INS custody was a parole into the United States, not an admission into this country. Likewise, petitioner has not adjusted his status to that of a lawful resident. Because the granting of parole is not an admission, the petitioner stands in the position of a person seeking admission or parole into the United States. *See* 8 U.S.C. 1182(d)(5)(A); *Leng May Ma v. Barber*, 357 U.S. 185, 190 (1958) ("the parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status . . . "). Petitioner's habeas demands that he be released from INS detention on parole into this country, despite the finding of the immigration judge that the petitioner is clearly excludable. However, parole, as noted by the First Circuit, was conceived of by Congress as:

> an indulgence to be granted only occasionally, in the case of rare and exigent circumstances, and only when it would plainly serve the public interest. The historical record admits of no doubt on this score. One can argue the wisdom of such a tight-fisted choice, or whether it comports with accepted notions of the American ideal. But, in what is demonstrably something less than the best of all possible worlds, it cannot reasonably be argued but that the Congress has sown the seeds of the parole authority in such a scanty way as to plant a decidedly austere garden.

Amanullah v. Nelson, 811 F.2d 1, 6 (1st Cir. 1987) (emphasis in original).

Indeed, "[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications . . . " *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984) (*en banc*), *aff'd on other grounds*, 472 U.S. 846 (1985). *See also Gonzalez v. Reno,* 212 F.3d 1338, 1340 (11th Cir. 2000); *Fernandez Roque, et al. v. Smith, et al.,* 734 F.2d 576, 583 (11th Cir. 1984). As an excludable alien with a final order of removal, the petitioner does not have constitutional rights to review of his detention, and his request for parole from detention. *Id.* Parole decisions are an integral part of the admissions process and inadmissable aliens like the petitioner cannot challenge such decisions as a matter of constitutional right. *See Fernandez-Roque v. Smith,* 734 F.2d at 582; *Jean v. Nelson,* 727 F.2d at 966, 972; *see also Alvarez-Mendez v. Stock,* 941 F.2d 956, 963 (9th Cir. 1991). As an excludable alien, his "rights are determined by the procedures established by Congress." *See Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1443 (5th Cir. 1993). Thus, petitioner does "not have a general right to the procedural due process guarantees of the Fifth Amendment." *Id.* Therefore, petitioner's arguments regarding the constitutionality of his continued detention in his habeas petition are improper.

Statutory and Legal Authority

The relevant detention provision governing the petitioner's detention is section 241(a) of the INA, 8 U.S.C. § 1231(a), which covers detention following entry of a final order of removal.[1] This provision generally affords the Attorney

[1] The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(Continued on following page)

General a ninety-day period to accomplish removal of the alien from the United States. *See* 8 U.S.C. § 1231(a)(1)(A) - (B). Congress has mandated detention of criminal aliens such as the petitioner during the ninety-day removal period: "During the removal period, the Attorney General *shall* detain the alien." 8 U.S.C.§ 1231(a)(2) (emphasis added). The statute further provides that, in certain circumstances, the Attorney General "may" continue to detain an alien after expiration of the ninety-day removal period:

> An alien ordered removed who is excludable under [Immigration and Nationality Act] section 212, removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) or who has been determined by the attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(A)(6). Petitioner's conviction renders him excludable under § 212(A)(2) of the INA, and in fact Immigration Judge ordered him removed based on § 212(a)(2)(B) of the INA, relating to his multiple criminal convictions. *See* Composite Exhibit B.

> (ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.
>
> (iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

8 U.S.C. § 1231(a)(1)(B). In this case, the petitioner's removal period began when he was transferred to INS custody on December 17, 1999.

In *Zadvydas*, the Supreme Court analyzed the custody scheme of the INA as it applies to aliens who have been previously admitted into the United States. The Court held that § 1231 did not authorize indefinite detention of aliens *admitted to or present in* the United States. However, the *Zadvydas* decision was limited in its application, and clearly does not apply to petitioner, who is an alien that never effected entry into the United States. Indeed, the *Zadvydas* Court specifically distinguished its decision from the Supreme Court's earlier decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). In *Mezei*, the Supreme Court held that the indefinite detention of an alien once lawfully admitted for permanent residence who departed the United States, and then was stopped at the border attempting to return, was constitutionally permissible. *See Mezei*, 345 U.S. at 215-216. This decision was based upon what is known as the "entry fiction," which holds that aliens not admitted into the United States, including those aliens who had been previously paroled by the INS, in fact are not "present" in this country.

Noting that the *Zadvydas* decision was not overturning that of *Mezei*, the *Zadvydas* Court wrote that "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Zadvydas*, 121 S.Ct. at 2500 (citations omitted). Because petitioner falls into the category of aliens who have not effected entry into the United States (and is instead an alien legally at the border seeking admission), *Zadvydas* provides no authority under which he could be granted parole from detention.

Indeed the limitation of the *Zadvydas* decision is underscored by certain provisions of the interim rules, published on November 14, 2001, by the Attorney General in the Federal Register, providing for special review procedures for aliens, detained beyond the removal period, who are subject to final orders of removal. *See* Fed. Reg. Nov. 14, 2001 Vol. 66, No. 220 pp. 56967-56982 ("Interim Rules"). Consistent with *Zadvydas* the Interim Rules provide a procedure for aliens subject to a final order of removal to present a claim that they should be released from detention because there is no significant likelihood that they will be removed in the reasonable [sic] foreseeable future. *Id.* at 56978. However, the Interim Rules do not apply to aliens who technically have not entered the United States, including those aliens who have previously been granted parole into the United States. *Id.* at 56977.

Judicial Review of Executive Discretion

Judicial review of immigration detention, where authorized, is limited to minimum scrutiny of the Attorney General's decisions in this area. *Carlson v. Landon,* 342 U.S. 524, 534 (1952); *Reno v. Flores,* 507 U.S. 292, 303, 306 (1993) (upholding the Attorney General's custody scheme for juvenile aliens because these rules met "the (unexacting) standard of rationally advancing some legitimate governmental purpose"). The scope of review of the discretionary decisions of executive branch in the immigration context is extremely limited. *Jean v. Nelson*, 727 F.2d at 976.

Procedurally, a court proceeding in habeas corpus is limited to a deferential review of an agency's decision for legal error or abuse of discretion. *Carlson*, 342 U.S. at 541. Congress' plenary power over immigration extends to all

non-citizens, including permanent resident aliens. *Id.* at 524, 534. The plenary power doctrine extends to all immigration detention decisions both because the power to detain is a necessary element of the power to deport (*Carlson*, 342 U.S. at 538; *Wong Wing v. United States*, 163 U.S. 228, 235 (1896)) and because release may jeopardize the public safety or otherwise compromise the objectives of immigration enforcement (*Carlson*, 342 U.S. at 538 (affirming detention as a means to deprive deportable aliens of "opportunities to hurt the United States")).

The petitioner's detention may be reviewed only to the extent of ascertaining whether the Attorney General has advanced a facially legitimate purpose. *Garcia-Mir v. Smith*, 766 F.2d 1478, 1484 – 1485 (11th Cir. 1985) ("[t]he facially legitimate and bona fide reason standard . . . applies to all of the Attorney General's parole decisions . . . "); *Jean v. Nelson,* 727 F.2d at 977 (scope of review limited to ascertaining whether the Attorney General has advanced a "facially legitimate and bona fide reason."); *Flores*, 507 U.S. at 306 (holding juvenile alien detention rule need only "meet the (unexacting) standard of rationally advancing some legitimate governmental purpose"); *Carlson*, 342 U.S. at 538, 542-46 (requiring only a "reasonable foundation" for prolonged detention of permanent resident alien).

Petitioner's detention by the INS is clearly based upon a facially legitimate and *bona fide* reason . . . that his release must be conditioned upon placement in a suitable half-way house or other facility. *See* 8 C.F.R. § 212.12(f). As the Eleventh Circuit noted in *Jean v. Nelson,* "[a]s to [excludable aliens], the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law." 727 F.2d at 968. The INS' decision to delay release until a suitable placement has been found is lawful

inasmuch as the petitioner is an excludable alien, and, therefore, his habeas corpus petition should be dismissed.

Conclusion

Petitioner's continued detention is lawful because he has never been admitted into the United States, and therefore he has no constitutional right to release from INS detention under *Zadvydas* or any other court decision. On these grounds, his petition should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer was served by first class mail on the *pro se* petitioner, DANIEL BENITEZ, at his address of record, Bay County Jail Annex, 5600 Nehi Road, Panama City, FL 323404 [sic], this March 18, 2002.

THOMAS F. KIRWIN
United States Attorney

/s/ Michael P. Finney
MICHAEL P. FINNEY
Fla. Bar No. 127084
Assistant U.S. Attorney
21 East Garden Street
Pensacola, FL 32501-5603
(850) 444-4000

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner,

vs. 5:02cv19/MMP/MD

ROBERT A. WALLIS

Respondent,

_____/

REPORT AND RECOMMENDATION

(Filed Apr. 8, 2002)

This matter is before the court upon a petition for writ of habeas corpus (doc. 1) filed pursuant to 28 U.S.C. § 2241. The respondents filed an answer (doc. 5), and petitioner filed a response (doc. 6).

Petitioner is an alien citizen of Cuba who entered this country in 1980. He contends that upon his release from the Florida Department of Corrections in July of 2001 after having served his sentence for armed robbery and armed burglary, he was re-arrested by officials from the Immigration and Naturalization Service ("INS"), and has been detained ever since. Petitioner asserts that mandatory, indefinite detention is unconstitutional and that he is entitled to release based on *Zadvydas v. Davis*, 533 U.S. 678, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001). In *Zadvydas*, the Supreme Court held that after a six month period of detention, if an alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the government must respond with evidence sufficient to rebut that showing order to justify continued detention. 121 S.Ct. at 2505. The court

also held that an alien may be confined until it has been determined that there is no significant likelihood of removal in the reasonably foreseeable future. *Id.*

According to the respondent, petitioner attempted entry into the United States on or about June 26, 1980. Aliens such as the petitioner who are Cuban and who attempted entry between April 15, 1980 and October 20, 1980 are known as "Mariel Cubans" because their departures from Cuba were generally part of the "Mariel Boatlift." Petitioner was paroled into the United States on or about July 3, 1980, *but has never adjusted his status to that of lawful permanent resident.*

Petitioner was convicted of grand theft on June 20, 1983 and received a three year term of probation (doc. 5, exh. B). Petitioner applied to adjust his immigration status to that of permanent resident, but the application was denied because his criminal conviction made him excludable under section 212(a)(9) of the Immigration and Nationality Act (doc. 5, exh. C). A second application was denied for lack of prosecution in March of 1990 (doc. 5, exh. D). On April 5, 1983 petitioner was sentenced to a twenty year term of imprisonment after being convicted of armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery and unlawful possession, sale or delivery of a firearm with altered or removed serial number (doc. 5, exh. E). By letter dated June 1, 1993, petitioner was advised that his parole was revoked and that he would be taken into custody of the INS pending exclusion proceedings (doc. 5, exh. F & G). On the same date the INS issued a notice to appear in which it charged that petitioner was subject to removal from the United

States because: (1) he was an alien who had been convicted of two or more offenses for which the aggregate sentences to confinement actually imposed were five years or more, § 212(a)(2)(B) of the INA, 8 U.S.C. § 1182(a)(2)(B); and (2) he was an intending immigrant not in possession of valid travel documents, § 212(a)(7)(A)(i)(I) of the INA, 8 U.S.C. § 1182(a)(7)(A)(i)(I) (doc. 5, exh. G). On December 12, 1994, petitioner was found to be subject to exclusion pursuant to both of the cited provisions (doc. 5, exh. H). He waived his right to appeal this decision (*Id.*).

On October 11, 2001, petitioner was notified that on November 6, 2001 his status would be reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody (doc. 5, exh. I). The instant petition challenging the petitioner's continued custody by the INS was filed on January 1, 2002 and received by the court on January 11, 2002. On January 17, 2002, petitioner was served with a Notice of Releasability by the Cuban Review Plan in which petitioner was advised that a panel had determined that he was releasable under the criteria established in the Plan (doc. 5, exh. J). He was further advised that he would not be released from custody until a suitable sponsorship or placement had been arranged for him. Finally, he was informed that his release from custody would be conditioned upon his continuing to maintain proper behavior while the search for sponsorship was underway, and that failure to do so could result in continued confinement.

Through the instant § 2241 petition, petitioner challenges the INS's custody over him and seeks release from detention. Respondent acknowledges the jurisdiction of the court, but states that the INS's continued custody over an inadmissible alien such as the petitioner is lawful and

must be upheld, notwithstanding the finding of the Cuban Review Plan that he is releasable.

Petitioner does not rebut respondent's contention that he entered the United States as a parolee[1] conditioned on a bond that was ultimately revoked, and that he has never successfully adjusted his immigration status to that of a lawful resident alien. Thus, petitioner's current position under the law is that of an alien seeking admission into the United States. Title 8 U.S.C. § 1182(d)(5)(A)[2]; *Leng May Ma v. Barber*, 357 U.S. 185, 190, 78 S.Ct. 1072, 1075, 2 L.Ed.2d 1246 (1958) ("[the parole of aliens seeking admission to the United States] was never intended to affect an alien's status"); *Jean v. Nelson*, 727 F.2d 957, 969 (11th Cir. 1984) ("an alien's legal status is not altered by detention or parole under the entry doctrine fiction."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 963 (9th Cir. 1991). Aliens seeking admission have neither a constitutional right to be admitted into this country, *Fernandez Roque v. Smith*, 734 F.2d 576, 583 (11th Cir. 1983) (citing *Landon v. Plasenci*, 459 U.S. 21, 32, 103 S.Ct. 321, 329, 74 L.Ed.2d

[1] Petitioner's boilerplate responsive memorandum agues, unpersuasively and contrary to established law, that Mariel Cubans should not be classified as aliens who have been "stopped at the border."

[2] Title 8 U.S.C. § 1182(d)(5)(A) provides in pertinent part that the "Attorney General may ... in his discretion parole into the United States temporarily ... any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

21, 32 (1982); *Bridges v. Wixon*, 326 U.S. 135, 151, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103, 2119 (1945)), nor any constitutional rights with regard to their applications for admission. *Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir. 1984); see also *United States v. Rodriguez-Fernandez*, 234 F.3d 498, 501 n.7 (11th Cir. 2000); *Gonzalez v. Reno*, 212 F.3d 1338, 1346 (11th Cir. 2000). And denial, or in this case revocation, of parole does not rise to the level of a constitutional infringement. *Fernandez-Roque*, 734 F.2d at 582; *Jean*, 727 F.2d at 972.

Title 8 U.S.C. §1231 governs detention and removal of aliens ordered removed. Section 1231(a)(1)(A) provides that once an alien is ordered removed the Attorney General shall remove the alien within a period of 90 days. During the removal period, the Attorney General is to detain the alien. Title 8 U.S.C. § 1231(a)(2) specifically provides that "[u]nder no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible under section 1182(a)(2)[3] or 1182(a)(3)(B)[4] of this title or deportable under section 1227(a)(2)[5] or 1227(a)(4)(B)[6] of this title." In spite of the

[3] This section provides that aliens convicted of certain crimes, including crimes involving moral turpitude, are inadmissible.

[4] This section provides that aliens whose admission raises security issues due to an intent to spy, sabotage or engage in terrorist activities, among other things, are inadmissible.

[5] This section provides that aliens convicted of certain crimes, including crimes for which a sentence of one year or longer may be imposed and crimes involving moral turpitude, are deportable.

[6] This section provides that aliens whose presence raises security issues due to an intent to or history of engaging in espionage, sabotage, or terrorist activities, among other things, are deportable.

finding of the panel under the Cuban Review Plan that petitioner is releasable, petitioner clearly could be classified as either inadmissible or deportable due to his criminal history, and would thus be subject to mandatory detention.

The Supreme Court's decision in *Zadvydas* limited the application of § 1231, holding that this statute does not authorize indefinite detention of aliens admitted to the United States. However, the individuals whose cases were before the *Zadvydas* court were aliens who were lawful permanent residents. For that reason, petitioner's reliance on *Zadvydas* as authority supporting his release is mistaken. The *Zadvydas* Court specifically differentiated between the situation of an alien who has effected entry into the United States, such as the petitioners in that case, and one, such as the instant petitioner, who has not. 121 S.Ct. at 2500. In particular, the Court distinguished and recognized the continued validity of *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). In *Mezei* it had found no constitutional infringement in the case of a lawfully admitted alien who left the United Stats, returned, was refused admission, and was left indefinitely detained on Ellis Island because the government could not find another country to accept him.

Zadvydas has undoubtedly affected the status of many INS detainees, including those identified by the petitioner in his reply memorandum. However, neither this case, nor any other provides relief for the Cuban petitioner, in light of his status as an excludable alien, despite the fact that there is no reasonable likelihood that he will be deported to his home country in the foreseeable future. And, because the record reflects a facially legitimate purpose for the petitioner's continued detention, that

his release must be conditioned upon the arrangement of a suitable sponsorship or placement, it is lawful. See 8 C.F.R. § 212.12(f).

Based on the foregoing, it is respectfully RECOMMENDED:

The petition for writ of habeas corpus (doc. 1) be DENIED.

At Pensacola, Florida, this 8th day of April, 2002.

/s/ Miles Davis
MILES DAVIS
UNITED STATES
MAGISTRATE JUDGE

NOTICE TO THE PARTIES

Any objections to these proposed findings and recommendations must be filed within ten days after being served a copy thereof. A copy of objections shall be served upon all other parties. Failure to object may limit the scope of appellate review of factual findings. *See* 28 U.S.C. § 636; *United States v. Roberts*, 858 F.2d 698, 701 (11th Cir. 1988).

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PANAMA CITY DIVISION

DANIEL BENITEZ,

Petitioner.

vs.

CASE NO. 5:02cv19 MMP

ROBERT A. WALLIS
DISTRICT DIRECTOR, I.N.S,

Respondent. /

ORDER

(Filed Jul. 11, 2002)

This matter is before the Court on the Report and Recommendation of the Magistrate Judge, which recommends denying Mr. Benitez' petition for writ of habeas corpus. For the reasons which follow, the Report and Recommendation is adopted.

Mr. Benitez attempted to gain access to the United States from Cuba illegally but was detained by the Immigration and Naturalization Service (INS) and eventually paroled into the country. He has not improved his status in the United States beyond that of a non-admitted parolee since that date.

In 1993, Mr. Benitez was convicted in a Florida state court of various crimes relating to armed robbery and sentenced to 20 years in prison. Also, his parole into the country was revoked by an INS panel and removal proceedings were commenced against him. When he was released from state custody, he was placed directly into

INS custody. He remains in INS custody pending completion of removal proceedings against him.

When an alien has been found to be unlawfully present in the United States and a final order of removal has been entered, the Government ordinarily secures the alien's removal during a subsequent 90-day statutory "removal period," during which time the alien normally is held in custody.

Moreover, Title 8 U.S.C.§§ 1231(a)(6) authorizes further detention if the Government fails to remove the alien during those 90 days. It says:

> An alien ordered removed [1] who is inadmissible . . . [2] [or] removable [as a result of violations of status requirements or entry conditions, violations of criminal law, or reasons of security or foreign policy] or [3] who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.

Based on this statute, the petitioner has been detained in INS custody since the completion of his state term of incarceration, pending his removal back to his Cuban homeland. The problem is that Cuba has declined to fully implement the repatriation treaty with the United States, and there is no indication that petitioner can be returned to Cuba in the foreseeable future. The petitioner claims that he is therefore being detained indefinitely and that such detention violates rights that he has under the United States Constitution.

The petitioner relies greatly on *Zadvydas v. Davis*, 121 S.Ct. 2491 (2001), which held that the above statute, applied to resident aliens, contained an implicit "reasonable time" limitation. Thus, resident aliens could not be indefinitely detained, and a post-removal-period detention of six months or less was deemed presumptively reasonable. Petitioner claims, therefore, that he must either be removed or released after six months detention.

The flaw in petitioner's argument, however, is that he is not a "resident alien," as the petitioners were in *Zadvydas*. Instead, he is a non-admitted parolee, and, as *Zadvydas* itself explained, that distinction makes a crucial difference. In *Zadvydas*, Justice Breyer explicitly discussed this distinction:

> The Government argues that, from a constitutional perspective, alien status itself can justify indefinite detention, and points to *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953), as support. That case involved a once lawfully admitted alien who left the United States, returned after a trip abroad, was refused admission, and was left on Ellis Island, indefinitely detained there because the Government could not find another country to accept him. The Court held that Mezei's detention did not violate the Constitution. *Id.*, at 215-216, 73 S.Ct. 625.
>
> Although *Mezei*, like the present cases, involves indefinite detention, it differs from the present cases in a critical respect. As the Court emphasized, the alien's extended departure from the United States required him to seek entry into this country once again. His presence on Ellis Island did not count as entry into the United States. Hence, he was "treated," for constitutional purposes, "as if stopped at the border."

Id., at 213, 215, 73 S.Ct. 625. And that made all the difference.

The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. See *Kaplan v. Tod*, 267 U.S. 228, 230, 45 S.Ct. 257, 69 L.Ed. 585 (1925) (despite nine years' presence in the United States, an "excluded" alien "was still in theory of law at the boundary line and had gained no foothold in the United States"); *Leng May Ma v. Barber*, 357 U.S. 185, 188-190, 78 S.Ct. 1072, 2 L.Ed.2d 1246 (1958) (alien "paroled" into the United States pending admissibility had not effected an "entry"). It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 269, 110 S.Ct. 1056, 108 L.Ed.2d 222 (1990) (Fifth Amendment's protections do not extend to aliens outside the territorial boundaries); *Johnson v. Eisentrager*, 339 U.S. 763, 784, 70 S.Ct. 936, 94 L.Ed. 1255 (1950) (same). But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent. See *Plyler v. Doe*, 457 U.S. 202, 210, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982); *Mathews v. Diaz*, 426 U.S. 67, 77, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1976); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596-598, and n. 5, 73 S.Ct. 472, 97 L.Ed. 576 (1953); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); cf. *Mezei, supra*, at 212, 73 S.Ct. 625 ("[A]liens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law"). Indeed, this Court has held that the

> Due Process Clause protects an alien subject to a final order of deportation, see *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S.Ct. 977, 41 L.Ed. 140 (1896), though the nature of that protection may vary depending upon status and circumstance, see *Landon v. Plasencia*, 459 U.S. 21, 32-34, 103 S.Ct. 321, 74 L.Ed.2d 21 (1982); *Johnson, supra*, at 770, 70 S.Ct. 936.

Zadvydas 121 S.Ct. at 2500-01.

Under the cases cited by Justice Breyer, Mr. Benitez's parole into the United States did not count as an "entry" into the United States. Therefore, Mr. Benitez does not enjoy the full panoply of Constitutional rights which accrue to a person who is deemed to have entered the United States. The result, as the Magistrate Judge correctly points out, is that this court's jurisdiction is limited to determining "whether there exists a facially legitimate and bona fide reason for the government's decision. . . . " *Jean v. Nelson*, 727 F.2d 957, 978 (11th Cir. 1984). Here, the INS determined that Mr. Benitez was removable because he posed a danger to the community and was likely to engage in further violent behavior. These are facially legitimate and bona fide reasons to attempt to remove him, and also to detain him until removal is possible. Accordingly, this Court has no jurisdiction to second-guess the decisions of INS on these issues, and it is hereby

ORDERED AND ADJUDGED:

1. The Report and Recommendation of the Magistrate Judge (doc.7) is adopted and incorporated herein.

2. The petition for writ of habeas corpus is DENIED, and the clerk is directed to close the file.

DONE AND ORDERED this 11th day of June, 2002.

/s/ Maurice M. Paul
Maurice M. Paul, Senior District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

DANIEL BENITEZ

VS CASE NO. 5:02cv19 MMP

ROBERT A. WALLIS

JUDGMENT

(Filed Jul. 12, 2002)

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that the Petitioner take nothing and that pursuant to Court's order denying the petition for writ of habeas corpus this action be DISMISSED.

WILLIAM McCOOL,
CLERK OF COURT

July 12, 2002
DATE

/s/ Louise Trautman
Deputy Clerk: Louise Trautman

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANIEL BENITEZ,	)	
Petitioner-Appellant,	)	
v.	)	**No. 02-14324-BB**
ROBERT A. WALLIS,	)	**(A24 650 034)**
Respondent-Appellee.	)	

RESPONDENT'S STATUS REPORT

Respondent, through undersigned counsel, respectfully advises the Court that the December 13, 2001 Notice of Releasability approving the Petitioner-Appellant for discretionary immigration parole under 8 U.S.C. § 1182(d)(5)(A) (2000) and 8 C.F.R. § 212.12 (2002) (Doc. 5 at Exh. J) has been withdrawn. *See* 8 C.F.R. § 212.12(e). The reasons for the decision (the petitioner's role in planning an escape) are set forth in the Notice of Release Withdrawal, dated and served March 10, 2003, a copy of which is attached to this Status Report. The petitioner will continue to receive consideration for immigration parole in accordance with the procedures set forth in 8 C.F.R. § 212.12.

Respectfully Submitted,

ROBERT D. McALLUM, JR.
Assistant Attorney General
Civil Division

PAPU SANDHU
Senior Litigation Counsel

/s/ EARadford
EMILY ANNE RADFORD
Assistant Director
Office of Immigration Litigation
Civil Division, Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, DC 20044
(202) 616-4885

May 12, 2003

U.S. Department of Justice
Immigration and Naturalization Service

Cuban Review Plan [LOGO]
Plan de Revisión de los Casos de los Detenidos Cubanos

Name:
Nombre: BENITEZ-CANEL, DANIEL
Date of Birth:
Fecha de Nacimiento: 02/18/1958
INS File No:
Número de INS: **A-24 650 034**
Bureau of Prisons File No.:
Número del Bureau de Prisones: 06045-000
Institution:
Institución: Miami District: Orlando Sub-office

Notice of Release Withdrawal

This notice will inform you that approval to parole you from immigration custody has been withdrawn as of this date for reasons stated below. You will be scheduled for another interview before a Cuban Review Panel. You will be notified in writing of the date of the interview.

Parole approval has been revoked pursuant to 8 U.S.C. ☐1182(d)(5) and 8 C.F.R. ☐212.12(b) and/or because:

Notificacion de Cancelación de la Libertad Condicional

La presenta notificación tiane por objeto informarle que, con fecha de boy, se ha retirado la aprobación para que usted quede en libertad condicional, fuera de la custodia de Inmagración, por los motivos que so citan a continuación. Se fijará una mueva entravista, cuya fecha se la comunicará por oscrito, para que usted aparazca ante un Panel de Revisión de los Casos de los Detenidos Cubanos.

La aprobación de su libertad condicional ha sido revocada de acuardo a las disposiciones de inciso ☐212.12(b) y/o (e) del 8 C.F.R. [Código de Reglamentos Federales] dabido a lo siguiante:

You were last interviewed by a Cuban Review Panel on or about 11/05/2001 at Bay County Jail in Bay County, Florida. Subsequent to said interview, you were designated for release as per a Notice of Releasability dated on or about 12/13/2001. On or about 03/07/2003, you were cited for planning an escape from the aforementioned Bay County Jail. Accordingly, in light of the aforementioned incident, the release decision previously afforded to you has been rescinded effective this date.

Associate Commissioner for Enforcement:
Sub-Comisionado Incargado del Cumplimiento de los Loyos de Inmigración: /s/ [Illegible]
Detainee:
Detenido: Refuse to Sign
Served by:
Entregado por: /s/ [Illegible]

Date:
Fecha: 03/10/2003
Date:
Fecha: 03-10-03 (1400 hrs)
Date:
Fecha: 03-10-03

[Certificate Of Service Omitted In Printing]

Case No. 02-14324-BB

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DANIEL BENITEZ,

Appellant,

v.

ROBERT A. WALLIS, in his capacity as District Director, U.S. IMMIGRATION & NATURALIZATION SERVICE,

Appellee.

PETITIONER'S MOTION TO STRIKE STATEMENT AND ATTACHMENT IN RESPONDENT'S STATUS REPORT

Petitioner Daniel Benitez, through the undersigned counsel duly appointed by the Court pursuant to Addendum Five, moves this Court to strike the a [sic] statement and the attachment to the Respondent's Status Report.

Petitioner does not object to the status report itself as it advises the court that the likelihood that this appeal could be rendered moot by his release on discretionary immigration parole under 8 U.S.C. § 1182(d)(5)(A) (2000) and 8 C.F.R. § 212.12 (2002) has been substantially reduced because the Notice of Releasability issued on December 13, 2001, has been withdrawn.

Respondent goes on to state that the reason for this decision is "the petitioner's role in planning an escape" and it attaches a copy of the Notice of Release Withdrawal, which reiterates this accusation. The only relevance this

withdrawal has on this case is that it removes any concern that this case will be rendered moot before the court can decide the case. The reason for the withdrawal has no legitimate bearing on this appeal. Moreover, as an event occurring after the district court's decision, the withdrawal is of course not in the record and cannot, as a matter of law, have any bearing on the correctness of the district court's order under review.

On the other hand, accusing the Petitioner of having a "role in planning an escape" is a prejudicial accusation that tends to cast the Petitioner in a negative light unrelated to the merits of this case. In fact, the Petitioner vehemently denies any role in any escape attempts. He has yet to be given an opportunity to respond to this allegation. The planned escape referred to by the Government appears to be an attempt by other inmates, Bay County Jail to escape. The Petitioner had no involvement with this attempt and, on information and belief, the only connection the Petitioner had to these other inmates was that they were all of Hispanic national origin.

The Petitioner intends to defend himself from any and all repercussions of the allegations against him, but this is not the forum for that issue to be resolved. The Government's reference to this allegation should therefore be stricken.

Certificate of Consulting Opposing Counsel

The undersigned counsel has consulted with Emily Anne Radford, Esq., attorney for Respondent and is authorized to state that the Respondent opposes the relief requested in this motion.

WHEREFORE, this Court should strike the parenthetical phrase in the second sentence of text in Respondent's Status Report and the attachment thereto.

Respectfully submitted,

MILLS & CARLIN, P.A.

/s/ John S. Mills

John S. Mills, Esq.
865 May Street
Jacksonville, Florida 32204
(904) 350-0075
(904) 350-0086 facsimile

Attorneys for Appellate
Daniel Benitez

[Certificate Of Service Omitted In Printing]

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Local Rule 26.1-1, the undersigned certifies that the following is a complete list of all trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this particular case or appeal, and includes subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

1. Daniel Benitez, Appellant, Lecanto, Florida
2. David V. Bernal, Attorney for Appellee, Assistant Director, Office of Immigration Litigation, Civil Division, U.S. Department of Justice

3. John M. Bulger, Acting INS District Director, Miami District

4. Hon. Miller Davis, Magistrate Judge, U.S. District Court for the Northern District of Florida

5. Michael P. Finner, Assistant U.S. Attorney, Northern District of Florida, Panama City, Florida

6. Andrew C. MacLachlan, Attorney for Appellee, Office of Immigration Litigation, Civil Division, U.S. Department of Justice

7. Robert D. McCallum, Jr., Attorney for Appellee, Assistant Attorney General, Civil Division, U.S. Department of Justice

8. Gregory Robert Miller, United States Attorney, Northern District of Florida

9. Hon. Maurice M. Paul, Senior District Judge, U.S. District Court for Northern District of Florida

10. Daniel Vara, INS District Counsel, Miami District

By: /s/ John S. Mills
John S. Mills
Attorney for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 02-14324

D. C. Docket No. 02-00019-CV-5-19-MMP

DANIEL BENITEZ,

Petitioner-Appellant,

versus

ROBERT WALLIS, Director INS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(July 17, 2003)

Before DUBINA, BLACK and HULL, Circuit Judges.

PER CURIAM:

Daniel Benitez, a native and citizen of Cuba, is an inadmissible alien who brought this § 2241 petition challenging his indefinite detention. The district court concluded that the INS's determinations that Benitez posed a danger to the community and was likely to engage in further violent behavior were facially legitimate and bona fide reasons to detain Benitez until removal to Cuba is possible. Consequently, the district court denied Benitez's § 2241 petition. After review and oral argument, we affirm.

I. BACKGROUND

In 1980, Daniel Benitez attempted entry into the United States from the port of Mariel, Cuba and, in effect, was stopped at the border.[1] Benitez then was paroled into the United States pursuant to § 212(d)(5) of the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1182(d)(5). Under § 1182(d)(5), the Attorney General may "in his discretion parole into the United States temporarily under such conditions as he may prescribe only on a case-by-case basis for urgent humanitarian reasons or significant public benefit any alien applying for admission to the United States." 8 U.S.C. § 1182(d)(5).

In 1983, Benitez was convicted in Dade County, Florida, of second degree grand theft, *see* Fla. Stat. § 812.014, and was sentenced to three years' probation. Sometime thereafter, Benitez submitted an application to adjust his status to that of a lawful permanent resident. Under applicable immigration laws, Cuban refugees may

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[1] Over the past twenty-five years,

> Castro has unleashed massive waves of refugees on the United States to release the pressure of internal dissent. In the Mariel boat-lift of 1980, Castro let some 125,000 Cubans flee to the United States. Many of these refugees were dissidents, criminals or mental patients. In the summer of 1994, facing increasing hostility to his regime and open defiance of the Communist Party, Castro allowed over 50,000 refugees to flee to the United States on make-shift rafts. After the exodus of 1994, Castro threatened to unleash another wave of refugees in the spring of 1995 in an effort to discourage passage of the Helms-Burton Act. . . .

C. Todd Piczak, *The Helms-Burton Act: U.S. Foreign Policy Toward Cuba, The National Security Exception to the GATT and the Political Doctrine*, 61 U. Pitt. L. Rev 287, 312-13 (Fall 1999).

apply for permanent resident status once they: (1) have been paroled into the United States; (2) have been physically present in the United States for one year; and (3) are eligible to receive an immigrant visa and are admissible to the United States for permanent residence. *See* 8 U.S.C. § 1255.[2]

Under the provisions of § 212(a) of the INA, certain classes of aliens are ineligible to receive an immigrant visa and are not admissible to the United States for permanent residence, and thus fail to meet the third condition outlined above. *See* 8 U.S.C. § 1182(a). One such class includes "[a]liens who have been convicted of a crime involving moral turpitude." 8 U.S.C. § 1182(a)(9) (1983). In 1985, Benitez's application for permanent resident status was denied because his criminal conviction for grand theft was a crime involving moral turpitude.[3]

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[2] Section one of the Cuban Refugee Adjustment Act of 1966, Pub.L. No. 89-732, 80 Stat. 1161, *as amended* 8 U.S.C. § 1255, historical and statutory notes, provides:

> That, notwithstanding the provisions of Section 245(c) of the Immigration and Nationality Act, . . . the status of any alien who is a native or citizen of Cuba and who has been inspected and admitted or paroled into the United States subsequent to January 1, 1959, and has been physically present in the United States for at least one year, may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if the alien makes an application for such adjustment, and the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence.

[3] A second application for adjustment of status filed by Benitez was denied in 1990 for lack of prosecution.

In 1993, Benitez pled guilty to a multi-count criminal indictment in Florida state court. Specifically, Benitez pled guilty to armed burglary of a structure, armed burglary of a conveyance, armed robbery, unlawful possession of a firearm while engaged in a criminal offense, carrying a concealed firearm, aggravated battery, and unlawful possession, sale or delivery of a firearm with an altered or removed serial number. The state court sentenced Benitez to 20 years' imprisonment.

Based on his 1993 criminal convictions in Florida, the INS determined that Benitez's continued immigration parole was against the public interest. Pursuant to 8 C.F.R. § 212.5(d)(2), the INS revoked Benitez's immigration parole.[4]

Benitez then was ordered to appear before an immigration judge "to determine whether he should be excluded and deported." The notice informed Benitez that he had a right to counsel and to have a friend or relative present at the hearing. In 1994, Benitez was found excludable and deportable to Cuba because of his criminal convictions in Florida.[5]

[4] According to § 212.5(d)(2), "when in the opinion of the district director in charge of the area in which the alien is located neither emergency nor public interest warrants the continued presence of the alien in the United States, parole shall be terminated upon written notice to the alien and he or she shall be restored to the status which he or she had at the time of parole." 8 C.F.R. § 212.5(d)(2) (1993).

[5] In 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). *See* Pub.L. No. 104-208, 110 Stat. 3009, 3009-546 (1996). IIRIRA made comprehensive changes to the Immigration and Nationality Act (INA), including changes in immigration terminology. *See generally Assa'ad v. United States Atty. Gen.*, 332 F.3d 1321, 1326-27 (11th Cir. 2003). Previously, individuals who were ineligible for admission to the United States were referred to as "excludable," while those who had gained admission were referred to as "deportable." *See* 8 U.S.C. §§ 1182, 1251 (1994). Excludable aliens are now referred to as "inadmissible" aliens. *See* 8 U.S.C. § 1182. Additionally, the amended INA now uses the term "removal proceedings" to refer to the proceedings applicable to both inadmissible and deportable aliens. *See* 8 U.S.C. § 1229a. For the purposes of this opinion, we use the terms excludable, inadmissable, and unadmitted interchangeably. We do so not to suggest that these terms under immigration laws will always have the exact same legal meaning, but rather because these terms as applied to Benitez are without any substantive difference. Benitez is excludable under the prior version of the INA, inadmissable under IIRIRA, and his immigration parole never constituted a formal admission or entry into the United States.

(Continued on following page)

On October 11, 2001, Benitez was released into INS custody. Benitez's status then was reviewed pursuant to the Cuban Review Plan to determine whether it was in the public interest to release him from INS custody.[6] On

[6] Before the Cuban Review Panel makes a recommendation that a detainee be granted parole, a majority of the Panel must conclude that: "(i) The detainee is presently a nonviolent person; (ii) The detainee is likely to remain nonviolent; (iii) The detainee is not likely to pose a threat to the community following his release; and (iv) The detainee is not likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(2).

The panel also must consider the following factors when determining whether to recommend further detention or release on parole of a detainee: "(i) The nature and number of disciplinary infractions or incident reports received while in custody; (ii) The detainee's past history of criminal behavior; (iii) Any psychiatric and psychological reports pertaining to the detainee's mental health; (iv) Institutional progress relating to participation in work, educational and vocational programs; (v) His ties to the United States, such as the number of close relatives residing lawfully here; (vi) The likelihood that he may abscond, such as from any sponsorship program; and (vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole." 8 C.F.R. § 212.12(d)(3).

November 6, 2001, Benitez appeared before the Cuban Review Panel.[7]

On January 11, 2002, Benitez filed this § 2241 petition challenging his indefinite detention by the INS. On January 17, 2002, Benitez received a Notice of Releaseability, in which a Cuban Review Panel concluded that Benitez was releaseable under the criteria established by the Cuban Review Plan at such time as the INS determined that a suitable sponsorship to a half-way house could be arranged.[8] *See* 8 U.S.C. § 1182(d)(5)(A); 8 C.F.R. § 212.12 (2002) (Parole determinations and revocations respecting Mariel Cubans). On March 10, 2003, Benitez's Notice of Releaseability was revoked because the INS concluded, without a hearing, that Benitez was involved in a planned jail escape. *See* 8 C.F.R. § 212.12(e).[9] Therefore, Benitez's current detention results not only from his inadmissible

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[7] According to § 212.12(d)(1),

> The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

8 C.F.R. § 212.12(d)(1).

[8] Although the Notice was served/delivered on January 17, 2002, it is dated December 13, 2001.

[9] Benitez disputes his involvement in the planned jail escape. This issue, however, is not before this Court.

alien status, but also from his violations of the conditions of his earlier immigration parole and the INS's determination that he has not refrained from criminal conduct while in custody.[10]

Benitez, proceeding *pro se* before the district court, asserted that his indefinite detention was unconstitutional in light of the Supreme Court's decision in *Zadvydas v. Davis,* 533 U.S. 678 (2001). According to the district court, the fact that Benitez was a "non-admitted parolee" made *Zadvydas* inapplicable because *Zadvydas* limited its holding to resident aliens. The district court concluded that the INS reasonably determined that Benitez was a danger to the community and was likely to engage in future criminal conduct. The district court further concluded that these determinations warranted Benitez's detention until he could be removed to Cuba. Finding no constitutional or statutory prohibition against Benitez's indefinite detention, the district court denied Benitez's § 2241 petition. Benitez timely appealed, and this Court, in its discretion, appointed counsel to represent Benitez on appeal.

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[10] Mariel Cubans who are being detained have their cases reviewed every year to determine whether they should be paroled. *See* 8 C.F.R. § 212.12(g)(2). There is no claim on appeal before this Court that Benitez has not received annual consideration for immigration parole in accordance with the Cuban Review Plan. Inadmissable aliens other than Mariel Cubans are considered for parole under similar procedures. *See* 8 C.F.R. § 241.4.

II. DISCUSSION

Benitez does not challenge the fact that he (1) attempted to enter illegally the United States, (2) never formally has been admitted into this country, and (3) is properly subject to removal. Instead, Benitez filed his § 2241 petition arguing only that his indefinite detention is impermissible given the Supreme Court's decision in *Zadvydas*.[11] On appeal, Benitez asserts that his indefinite detention violates both the United States Constitution and federal law.[12]

The INS continues to detain Benitez pursuant to 8 U.S.C. § 1231(a)(6). Thus, we first discuss § 1231(a)(6) and how the Supreme Court interpreted § 1231(a)(6) in *Zadvydas*. We then analyze the legal issues presented in Benitez's appeal.

A. 8 U.S.C. § 1231(a)(6)

After an alien, such as Benitez, is ordered removed from the United States, the Attorney General must attempt to secure the alien's removal within 90 days. *See* 8

[11] The Supreme Court has determined that habeas jurisdiction under § 2241 for cases involving aliens was not repealed by ADEPA [sic] or IIRIRA. *See INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *see also Zadvydas*, 533 U.S. at 688 (concluding that "§ 2241 habeas corpus proceedings remain available as a forum for statutory and constitutional challenges to post-removal-period detention").

[12] The government does not contend that repatriation by Cuba of Benitez is reasonably foreseeable. Thus, we accept Benitez's claim that he, at present, is subject to indefinite detention.

U.S.C. § 1231(a)(1) (the "removal period").[13] "Under no circumstance during the removal period shall the Attorney General release an alien who has been found inadmissible. . . . " 8 U.S.C. § 1231(a)(2). Congress, however, recognized that securing an alien's actual removal within 90 days is not always possible. Consequently, § 1231(a)(6) expressly authorizes the Attorney General to detain aliens beyond the 90-day removal period, as follows:

> An alien ordered removed who is inadmissible under section 1182 of this title, removable [for

[13] In its response brief on appeal, the government asserts that pre-IIRIRA rules govern Benitez's indefinite detention. However, in the district court proceedings, the government relied on IIRIRA, did not assert that pre-IIRIRA rules applied, and did not dispute (in any way) the district court's application of IIRIRA. Therefore, the issue of whether IIRIRA applies to Benitez's claims has been waived by the government in this particular case. *See Onishea v. Hopper*, 171 F.3d 1289, 1305 (11th Cir. 1999) (*en banc*); *Depree v. Thomas*, 946 F.2d 784, 793 (11th Cir. 1991). Consequently, we apply IIRIRA to this case, but note that IIRIRA's application in Benitez's case is not free from doubt because the deportation proceedings against Benitez commenced in 1993 and Benitez's final deportation order was entered in 1994, both events well prior to IIRIRA. *See Rosales-Garcia v. Holland*, 322 F.3d 386, 401-03 (6th Cir. 2003) (*en banc*) (discussing which statute to apply), *cert. denied*, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); *cf. Akinwale v. Ashcroft*, 287 F.3d 1050, 1052 n.2 (11th Cir. 2002) (applying IIRIRA to an indefinite detention claim where deportation proceedings commenced in 1995, prior to IIRIRA, but the final order of deportation was entered on October 3, 1997, after IIRIRA); *see also Alanis-Bustamante v. Reno*, 201 F.3d 1303, 1306-07 (11th Cir. 2000) (discussing how Congress divided deportation proceedings into three categories). Thus, we expressly do not address whether Benitez's indefinite detention claims in his § 2241 petition should be tied to his 1994 deportation order and governed by pre-IIRIRA law or whether IIRIRA applies because Benitez is not challenging his 1994 deportation order but only the length of his detention pursuant to that order.

> violations of nonimmigrant status or entry conditions, violations of criminal laws, or threatening national security] or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

8 U.S.C. § 1231(a)(6).

B. *Zadvydas*

In *Zadvydas,* the Supreme Court expressly addressed whether the government's authority under § 1231(a)(6) to detain two legal permanent residents beyond the 90-day removal period allowed the government to detain them indefinitely. The two legal permanent residents were ordered removed based on criminal convictions. The government, however, could not effectuate their removal because no country would accept them.

Specifically, Kestutis Zadvydas was a legal permanent resident alien of Lithuanian decent, who was born in a displaced persons camp in Germany in 1948. *Zadvydas,* 533 U.S. at 684. Zadvydas had a long criminal history and also a long history of flight, both in his criminal proceedings and his deportation proceedings. *Id.* In 1992, Zadvydas was convicted of possession with intent to distribute cocaine and was sentenced to 16 years' imprisonment in state prison. *Id.* After only two years' imprisonment, he was released into INS custody and ordered deported to Germany. *Id.*

Germany, however, refused to accept Zadvydas because he was not a German citizen. *Id.* Next, the INS

attempted to deport Zadvydas to Lithuania. *Id.* Lithuania refused to accept Zadvydas because he was not a citizen or a permanent resident of Lithuania. *Id.* The INS also tried unsuccessfully to deport Zadvydas to the Dominican Republic (Zadvydas's wife's country). *Id.*[14]

In *Zadvydas,* the Supreme Court also considered the case of Kim Ho Ma. *Id.* at 685. Ma was born in Cambodia, but fled to the United States at an early age. *Id.* In 1995, Ma was convicted of manslaughter and was sentenced to 38 months' imprisonment. *Id.* After two years' imprisonment, he was released into INS custody and ordered removed. *Id.* The United States, however, has no repatriation treaty with Cambodia. *Id.* at 686. Having no place to send Ma, the INS kept him in custody because "it was unable to conclude that Mr. Ma would remain nonviolent and not violate the conditions of release." *Id.* at 685-86 (internal quotation marks omitted).[15]

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[14] The district court ordered Zadvydas released under supervision because it believed that "the Government would never succeed in its efforts to remove Zadvydas from the United States, leading to his permanent confinement, contrary to the Constitution." *Zadvydas,* 533 U.S. at 685. The Fifth Circuit reversed, concluding "that Zadvydas' detention did not violate the Constitution because eventual deportation was not 'impossible,' good-faith efforts to remove him from the United States continued, and his detention was subject to periodic administrative review." *Id.*; *see also Zadvydas v. Underdown,* 185 F.3d 279 (5th Cir. 1999).

[15] In the district court, more than one hundred habeas corpus petitioners, like Ma, challenged their ongoing detention by the INS. The district court designated five lead cases that presented issues common to all petitioners and directed the parties to brief and argue those issues before five district court judges. The five district court judges issued a joint order establishing a legal framework to apply in each individual case. The five-judge panel determined that the Constitution

(Continued on following page)

In evaluating indefinite detention in *Zadvydas,* the Supreme Court considered whether indefinite detention of resident aliens, if authorized by § 1231(a)(6) as the government contended, would present constitutional problems. The Supreme Court acknowledged that the two resident alien petitioners in *Zadvydas* enjoyed certain constitutional privileges associated with individuals who have gained entry into the United States. *Id.* at 693.

In *Zadvydas,* the Supreme Court also explained that *Shaughnessy v. United States ex rel. Mezei,* 345 U.S. 206 (1953), permits the indefinite detention of unadmitted aliens whom the government is unable to return anywhere else, but noted that *Mezei* "differs from the present cases [in *Zadvydas*] in a critical respect." *Zadvydas,* 533 U.S. at 693. The critical difference is that the alien in *Mezei* was "treated, for constitutional purposes, as if stopped at the border." *Zadvydas,* 533 U.S. at 693 (internal citations omitted). According to the Supreme Court in *Zadvydas,* "that made all the difference" in its earlier decision that Mezei's indefinite detention did not violate the Constitution. *Id.*

In *Zadvydas,* the Supreme Court further stressed that "[t]he distinction between an alien who has effected an entry into the United States and one who has never

forbids post-removal detention unless there is a realistic chance that the alien will be deported. The panel further concluded that because there was no repatriation agreement with Cambodia, there was no realistic chance that Ma and the others would be deported. A single judge then applied this ruling to Ma and held that he should be released. The Ninth Circuit affirmed Ma's release for essentially the same reasons as outlined by the panel of five judges. *See Kim Ho Ma v. Reno,* 208 F.3d 815 (9th Cir. 2000).

entered runs throughout immigration law." 533 U.S. at 693. The Supreme Court also emphasized that "[i]t is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders." *Id.* (citations omitted). "But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent." *Id.* (citations omitted).

After an extended discussion of the serious constitutional problems of permitting the indefinite detention of legal permanent residents as opposed to unadmitted aliens, the Supreme Court in *Zadvydas* saved § 1231(a)(6) from unconstitutionality in the context of a resident alien by limiting the post-removal-period detention to a length of time reasonably necessary to bring about the actual removal of the resident alien. *Id.* at 694-99. The Supreme Court then recognized six months as a presumptively reasonable time of post-removal-period detention for resident aliens. *Id.* at 699-702.

C. Circuit Split Post-*Zadvydas*

A circuit split has developed as to whether *Zadvydas* limits only the government's authority to detain resident aliens or whether *Zadvydas* applies to all categories of aliens. *Compare Borrero v. Aljets,* 325 F.3d 1003, 1007 (8th Cir. 2003) (concluding "that *Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissible aliens"); *Rios v. I.N.S.,* 324 F.3d 296, 297 (5th Cir. 2003) (concluding that *Zadvydas* "distinguished the status of

deportable aliens from that of excludable aliens"); *Hoyte-Mesa v. Ashcroft,* 272 F.3d 989, 991 (7th Cir. 2001) (concluding that an inadmissible alien's "continued detention does not violate due process"), *cert. denied*, 123 S. Ct. 185 (2002); *with Rosales-Garcia v. Holland,* 322 F.3d 386, 408 (6th Cir. 2003) (*en banc*) (applying the reasonableness limitation that the Supreme Court read into § 1231(a)(6) in *Zadvydas* to inadmissible aliens), *cert. denied*, 71 U.S.L.W. 3652, 3787, 3789 (U.S. June 23, 2003) (No. 02-1464); *Xi v. I.N.S.,* 298 F.3d 832, 837-39 (9th Cir. 2002) (same).[16] Although a circuit split exists, the Supreme Court has denied certiorari in cases representing both viewpoints.

This case, however, requires us to join the debate and determine whether unadmitted aliens, post-*Zadvydas,* may be detained indefinitely under § 1231(a)(6). To do so, we first discuss why Benitez remains an inadmissable alien and then whether inadmissible aliens have a constitutional right to be free from indefinite detention. We then examine whether the reasonableness component, as read

[16] The Sixth Circuit decision in *Rosales* was the result of an interesting procedural history. The district court denied the petitioner's § 2241 petition. The Sixth Circuit reversed the district court on January 31, 2001, and concluded that the indefinite detention of inadmissible aliens violates the Fifth Amendment. Following *Zadvydas,* the government petitioned the Supreme Court for certiorari, requesting that the Sixth Circuit's decision be vacated and remanded in light of *Zadvydas.* The Supreme Court granted the government's motion and vacated and remanded the case for reconsideration in light of *Zadvydas.* The Sixth Circuit then heard the case on remand *en banc* and concluded that the Supreme Court's interpretation of § 1231(a)(6) applied to all classes of aliens. The Supreme Court then denied certiorari.

into § 1231(a)(6) by the Supreme Court in *Zadvydas,* applies to inadmissible aliens.

D. Benitez Is an Inadmissible Alien

Because the status of the alien affects the issues herein, we begin by confirming Benitez's alien status. Although Benitez has been present physically in the United States for more than 20 years, we readily conclude that Benitez never formally has been admitted and remains an inadmissable [sic] alien.

As mentioned above, Benitez arrived in the United States as part of the Mariel boat-lift, was stopped at the border, and paroled into this country. He was paroled because Congress has recognized that it is often necessary to permit arriving aliens, such as Benitez, to make a temporary, unofficial entry into the United States pending the resolution of their applications. *See Mezei,* 345 U.S. at 215; *see also* 8 U.S.C. § 1225(b) (alien who does not appear to examining immigration officer to be entitled to land may be detained for further inquiry); 8 U.S.C. § 1182(d)(5)(A) (granting authority to the Attorney General to parole aliens seeking admission into the United States, but providing that parole does not constitute an admission of the alien). Furthermore, the Supreme Court has rejected claims that the parole or detention of an unadmitted alien has any effect on the alien's status under the law. *See Leng May Ma v. Barber,* 357 U.S. 185, 1886 (1958).[17] Because an alien's legal status is not altered by

[17] In *Leng May Ma,* the Supreme Court noted that "[f]or over a half century this Court has held that the detention of an alien in custody

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detention or parole, it is clear that Benitez is, and remains, an inadmissable alien and is similar to any other alien who has not gained entry and is stopped at this country's border. *See Jean v. Nelson,* 727 F.2d 957, 969-70 (11th Cir. 1984) (*en banc*).

Any discussion of Benitez's rights in the immigration context must also start with the fundamental difference in the legal status of (1) unadmitted aliens and (2) resident aliens who have effected "entry" into the United States, whether illegally or legally. This critical difference not only was recognized in *Zadvydas,* but has been a hallmark of immigration law for more than a hundred years. For example, in *Leng May Ma,* the Supreme Court emphasized that "our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission . . . and those who are within the United States after an entry, irrespective of its legality." 357 U.S. at 187. The Supreme Court continued that "[i]n the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'" *Id.* (quoting *Mezei,* 345 U.S. at 212).

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pending determination of his admissibility does not legally constitute an entry though the alien is physically within the United States." 357 U.S. at 188. Likewise, the Supreme Court explained that "[t]he parole of aliens seeking admission is simply a device through which needless confinement is avoided while administrative proceedings are conducted. It was never intended to affect an alien's status. . . . " *Id.* at 190; *see also Mezei,* 345 U.S. at 215 (alien permitted to enter pending a decision on admissibility "is treated as if stopped at the border"). This principle has become known as the "entry doctrine" fiction.

The Supreme Court further has explained that aliens seeking admission, such as Benitez, have no constitutional rights regarding their applications for admission. *See Landon v. Plasencia,* 459 U.S. 21, 32 (1982) ("[A]n alien seeking admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. . . . [H]owever, once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); *Kwong Hai Chew v. Colding,* 344 U.S. 590, 600 (1953) ("'excludable' aliens . . . are not within the protection of the Fifth Amendment"); *Bridges v. Wixon,* 326 U.S. 135, 161 (1945) (Murphy, J., concurring) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these shores.").

E. Constitutional Analysis

Against this background, we now examine whether, post-*Zadvydas,* the indefinite detention of an inadmissable alien, like Benitez, violates the Constitution. As mentioned above, the Supreme Court in *Mezei* expressly addressed the government's authority to detain indefinitely unadmitted aliens. Mezei had lived in the United States for approximately 25 years. 345 U.S. at 208. He left the United States in 1948, without authorization or reentry papers, and resided in Hungary for 19 months. *Id.* He then attempted to return to the United States. *Id.* The United States refused to admit Mezei into the country, and he was detained indefinitely on Ellis Island.

Because Mezei had voluntarily left the country, the Supreme Court had "no difficulty in holding respondent an

entrant alien or 'assimilated to [that] status' for constitutional purposes." *Mezei,* 345 U.S. at 214 (quoting *Kwong Hai Chew v. Colding,* 344 U.S. 590, 599 (1953)). The Supreme Court also stated that:

> It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. But an alien on the threshold of initial entry stands on a different footing: Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.

Mezei, 345 U.S. at 212 (internal citations and quotation marks omitted). The Supreme Court concluded that the unadmitted alien's continued, even indefinite, detention did not deprive him of any statutory or constitutional rights. *Id.* at 215.

This Court, sitting *en banc,* also has addressed the constitutional rights of inadmissible aliens in the context of indefinite detention. In *Jean v. Nelson,* 727 F.2d 957 (11th Cir. 1984) (*en banc*), this Court considered a group of Haitian aliens who were inadmissible and were being detained at various INS facilities pending a final determination of the merits of their individual asylum claims. After noting "the fundamental distinction between the legal status of excludable or unadmitted aliens and aliens who have succeeded in effecting an 'entry' into the United States," this Court concluded that "[a]liens seeking admission to the United States . . . have no constitutional rights with regard to their applications and must be content to accept whatever statutory rights and privileges they are granted by Congress." *Jean,* 727 F.2d at 967-68.

This Court then addressed the concerns of the critics of a policy or legal system that allowed for the indefinite detention of aliens. In *Jean,* this Court noted that

> [s]ome courts and commentators have suggested that when an exercise of the government's power to exclude results in an indefinite detention of an excludable alien, at some point the continued imprisonment becomes punishment, regardless of the legal justifications or fictions involved. These authorities contend that at this juncture the government should be required to make some justification to continue to detain the alien.

Id. at 974. The *Jean* Court concluded "that we must resist the temptation to tamper with the authority of the Executive by ruling that excludable aliens have constitutional rights [against indefinite detention], even with regard to their applications for parole." *Id.* at 975.

The *Jean* decision is based on *Mezei.* Although *Mezei* has been criticized heavily by academic commentators, it remains good law. As mentioned above, *Mezei* is distinguished and preserved, but is not overruled, in *Zadvydas. See Zadvydas,* 533 U.S. at 693-94. As *Mezei* remains valid precedent, so does *Jean.* Consequently, we conclude that inadmissible aliens, like Benitez, have no constitutional rights precluding indefinite detention. *See, e.g., Borrero,* 325 F.3d at 1007-08; *Rios,* 324 F.3d at 297; *Hoyte-Mesa,* 272 F.3d at 991.

F. Statutory Right under § 1231(a)(6)

Although Benitez does not have a constitutional right precluding indefinite detention, we also must consider

whether he has a statutory right under § 1231(a)(6), post-*Zadvydas,* prohibiting indefinite detention. As previously mentioned, a circuit split has developed as to the breadth of *Zadvydas*'s holding. The Fifth, Seventh, and Eighth Circuits have concluded that *Zadvydas* does not affect the government's long-standing authority to detain indefinitely unadmitted aliens. Although three circuits have so concluded, the Fifth Circuit in *Rios* and the Seventh Circuit in *Hoyte-Mesa* do not engage in any statutory analysis of how § 1231(a)(6) must be read after *Zadvydas.* Rather, they simply conclude that *Zadvydas* did not overrule *Mezei* and, therefore indefinite detention of unadmitted aliens is permissible. This conclusion, however, begs the separate question of statutory construction and whether the Supreme Court's interpretation of § 1231(a)(6) in *Zadvydas* must now apply uniformly to all types of aliens.

The Eighth Circuit in *Borrero* specifically does address the statutory issue of whether the *Zadvydas* Court's statutory construction of § 1231(a)(6) as containing a "reasonableness" component must apply categorically to all aliens, regardless of the alien's legal status. *Borrero,* 325 F.3d at 1005-07. The Eighth Circuit concluded that *Zadvydas*'s narrowing construction of § 1231(a)(6) does not limit the government's statutory authority to detain unadmitted aliens "[b]ecause the detention of unadmitted aliens does not raise the same constitutional concerns as does the detention of admitted aliens." *Id.* at 1005. The Eighth Circuit stressed that "[t]he constitutional issue avoided in *Zadvydas* is simply not present in the context of aliens who have not effected an entry into the United States." *Id.* at 1007.

In doing so, the Eighth Circuit expressly rejected alien Borrero's argument that the same statutory construction of § 1231(a)(6) must apply "categorically to all future cases whether or not the circumstances raise the same constitutional questions." *Borrero,* 325 F.3d at 1007. The Eighth Circuit acknowledged that the Ninth and the Sixth Circuits have taken the view that the same construction must apply, but the Eighth Circuit disagreed for several reasons. *Id.*

First, the Eighth Circuit "interpret[ed] *Zadvydas* as limiting the detention of only those aliens whose detention raises serious constitutional doubt – admitted aliens." *Borrero,* 325 F.3d at 1007. Second, the Eighth Circuit emphasized that "*Zadvydas* itself does not mandate uniform application of § 1231(a)(6) to all aliens." *Id.* The Eighth Circuit reached this conclusion based, in part, on the Supreme Court's notation that "'terrorism or other special circumstances' may justify greater deference to Congress and the Executive." *Id.* (quoting *Zadvydas,* 533 U.S. at 697). Third, the Eighth Circuit stressed how *Zadvydas* "expressly distinguished *Mezei* on the grounds that Mezei had not made an entry into the United States." *Borrero,* 325 F.3d at 1007. Based on these reasons, the Eighth Circuit concluded that "*Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissable [sic] aliens." *Id.*

We find the Eighth Circuit's reasoning persuasive and interpret *Zadvydas* as limiting the detention period of only those aliens whose continued confinement raises serious constitutional doubt, i.e., resident aliens who have effected entry. *See id.; Xi,* 298 F.3d at 841-42 (9th Cir. 2002) Rymer, J., dissenting). *But see Rosales-Garcia,* 322 F.3d at 408; *Xi,* 298 F.3d at 837-39. In addition to the rationale given by

the Eighth Circuit in *Borrero,* we adopt this view for several other reasons.

First, *Zadvydas* reads like an as-applied constitutional challenge where the Supreme Court repeatedly stated that its holding would not necessarily apply to other situations. As previously stated, *Zadvydas* opens with the statement that "[a]liens who have not gained initial admission to this country would present a very different question." *Zadvydas,* 533 U.S. at 682. Because *Zadvydas* was qualified in so many respects and reads like an as-applied decision, we conclude that the Supreme Court left the law, and it seems to us the statutory scheme too, intact with respect to inadmissible aliens who never have been admitted into the United States.

Second, as does the dissent in the Ninth Circuit's *Xi* decision, we "take the Supreme Court at its word: while indefinite detention raises serious constitutional questions in the case of aliens who have been admitted to the United States, '[a]liens who have not yet gained initial admission to this country would present a very different question.'" *Xi,* 298 F.3d at 840 (Rymer, J., dissenting) (quoting *Zadvydas,* 533 U.S. at 682). As does the *Xi* dissent, we reject the argument that *Zadvydas* leaves us little choice but to apply § 1231(a)(6) uniformly to all aliens. *See Xi,* 298 F.3d at 841 (Rymer, J., dissenting). As aptly stated by Judge Rymer, "[w]e do have a choice because the Court's interpretation was discrete as to *admitted* aliens" and "[i]t was driven by the need to avoid constitutional problems that pertain to those who are admitted – but that do not pertain to those who are *not* admitted." *Id.* We further agree with Judge Rymer that "[t]he result is a nuanced interpretation of § 1231(a)(6) that keeps it from being applied unconstitutionally but otherwise leaves it alone.

When a statute has different applications, it is not necessary to say that it is categorically infirm; it is only the constitutionally problematic aspects which are subject to the construction that avoids the problem." *Id.*

Third, *Zadvydas* emphasizes: "Nor do the cases before us require us to consider the political branches' authority to control entry into the United States. Hence we leave no 'unprotected spot in the Nation's armor.'" *Zadvydas,* 533 U.S. at 695-96 (citation omitted). The ability to exclude aliens from this country at its borders is a duty entrusted to the Executive Branch so that it may protect the citizens and residents of this country from all manner of nameless dangers. Creating a right to parole for unadmitted aliens after six months would create an unprotected spot in this country's defense of its borders. For example, it may be the case that the government will not be able to determine what potential dangers a particular unadmitted alien might pose. In such a situation, the government historically has enjoyed broad latitude in detaining those aliens until their security threat can be fully ascertained. Removing this important tool from the government's arsenal undoubtedly would subject the residents of this nation to greater security risks.

Moreover, in the instant case, the government *already* has determined that Benitez poses a danger to the community and is likely to engage in further violent behavior, and therefore is a security threat. Benitez engaged in serious criminal conduct while paroled into this country. Even after his parole was revoked based on his criminal convictions, the INS again issued a Notice of Releaseability, but later revoked that Notice based on its determination that Benitez still refused to conform his conduct to the laws of this nation. In light of Benitez's criminal history,

requiring Benitez's release after six months' detention does, in fact, create the very "unprotected spot in the Nation's armor" that the Supreme Court sought to avoid in *Zadvydas*. *See Xi,* 298 F.3d at 842 (Rymer, J., dissenting). We decline to read § 1231(a)(6) so as to deprive the Executive Branch of this authority absent an express statement from the Supreme Court to the contrary.

Fourth, ideally Benitez should be returned as soon as possible to his own country. However, this cannot happen if his own country will not allow it. Congress has given the Attorney General the discretion to detain or parole persons who are not admitted into this country and whose own country will not take them back. In light of the fact that the Supreme Court in *Zadvydas* went to such great lengths to distinguish inadmissible aliens, we shall not fetter that discretion by presumptively requiring their release into this country after six months. As stated by Judge Rymer, "Congress did not prescribe it, nor does a serious constitutional doubt compel it, and we have no call to construe § 1231(a)(6) to contain this limitation for inadmissible aliens." *Xi,* 298 F.3d at 843 (Rymer, J., dissenting).

Fifth and finally, reading § 1231(a)(6) as creating a right to parole into this country after six months for inadmissible aliens is undoubtedly a drastic expansion of the rights of inadmissible aliens, who have never gained entry into this country. It is without question that Congress had a contrary intention when enacting IIRIRA: it sought to tighten immigration regulations. As the very language of IIRIRA mandates, courts are not to construe IIRIRA to "create any substantive or procedural right or benefit that is legally enforceable." 8 U.S.C. § 1231(h). It is also clear that Congress intended the use of the term

"inadmissibility" to subject removable aliens to the same potential for indefinite detention – if they could not be removed after the commission of a serious crime – to which excludable aliens had been subject both statutorily and constitutionally for years. *See*, *e.g.*, S. Rep. 104-249, 1996 WL 180026 at ("The opportunity that U.S. immigration law extends to aliens to enter and remain in this country is a privilege, not an entitlement.").

Inadmissible aliens such as Benitez never truly have resided in this country free from restraint. Rather, Congress has bestowed on them the luxury of parole while their immigration applications and status are finalized. To pervert this gift from Congress into a right after six months not only would distort Congress's intent and potentially create grave security concerns for the people of the United States, but also would create needless difficulties in how the INS processes aliens. Because *Zadvydas*'s holding is qualified in so many regards, and there is no need to construe § 1231(a)(6) to avoid constitutional due process concerns for inadmissible aliens, the government has the authority under § 1231(a)(6) to detain inadmissable aliens indefinitely and *Zadvydas*'s six-month presumption of reasonableness is inapplicable to inadmissible aliens.

III. CONCLUSION

For all the above reasons, we affirm the district court's denial of Benitez's § 2241 petition.

AFFIRMED.

United States Court of Appeals
For the Eleventh Circuit

No. 02-14324

District Court Docket No.
02-00019-CV-5-19-MMP

DANIEL BENITEZ,

Petitioner-Appellant,

versus

ROBERT WALLIS,
Director INS,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: July 17, 2003
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

Office of the Clerk

Supreme Court of the United States
Washington, D.C. 20543-0001

January 16, 2004

John S. Mills
Mills & Carlin
865 May St.
Jacksonville, FL 32204

Re: 03-7434 Benitez v. Wallis

Dear Mr. Mills:

The Court today entered the following order in the above stated case:

> "The motion of petitioner for leave to proceed in forma pauperis and the petition for a writ of certiorari are granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Wednesday, February 25, 2004. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 26, 2004. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 19, 2004. Rule 29.2 does not apply."

Sincerely,

WILLIAM K. SUTER, CLERK

/s/ D. J. McNerney
Merits Cases Clerk
Phone: 202-479-3032/ Fax: 479-3204
djmerits@scus.gov
